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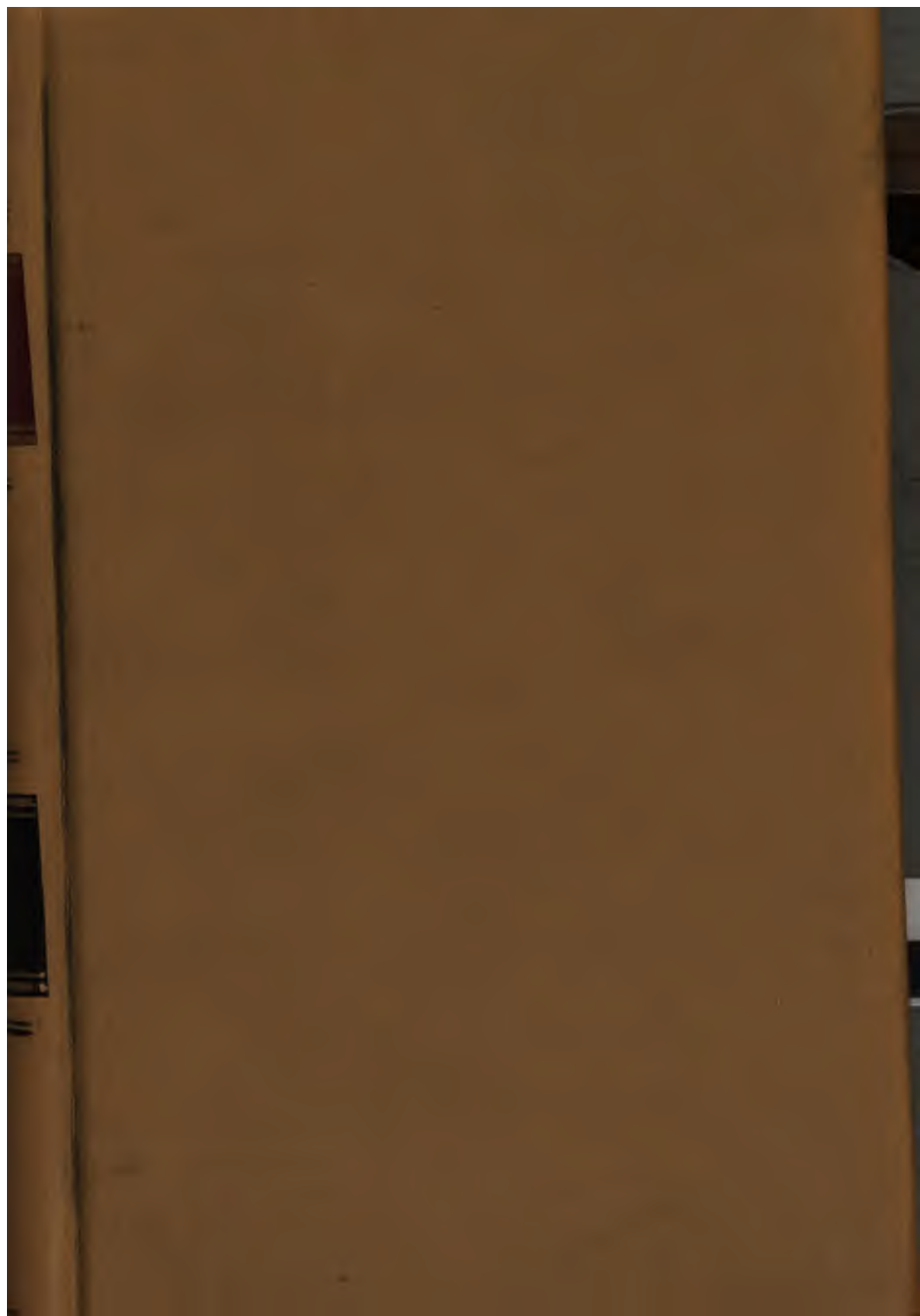
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NEW JERSEY EQUITY REPORTS.

VOLUME XIII.

BEASLEY II.

61
REPORTS OF CASES

ARGUED AND DETERMINED IN

THE COURT OF CHANCERY

AND, ON APPEAL, IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

MERCER BEASLEY, REPORTER.

TRENTON:

PRINTED BY PHILLIPS & BOSWELL,

No. 4 Chancery-court.

1863.

W



JUDGES OF THE COURT OF ERRORS AND APPEALS.

EX OFFICIO JUDGES.

HON. HENRY W. GREEN, CHANCELLOR,
“ EDWARD W. WHELPLEY,
“ ELIAS B. D. OGDEN,
“ DANIEL HAINES,
“ PETER VREDENBURGH,
“ LUCIUS Q. C. ELMER,
“ WILLIAM T. CLAWSON,
“ JOHN VAN DYKE.

JUDGES SPECIALLY APPOINTED.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

SPECIAL TERM, MARCH, 1860.

HENRY W. GREEN, Esq., CHANCELLOR.

JOSEPH MULFORD and wife vs. SARAH F. HIERS and others.

In proceedings for partition, where after a sale of the premises the widow who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statutes of this state, to accept in lieu of her said dower such sum in gross as the Chancellor should deem reasonable, and then having died before distribution, it was *held*, that the right vested in the widow to receive a sum in gross, interest could not be divested by her death, but should go to her children. *Held further*, that the value of the widow's interest should be ascertained on the principles of life annuities.

Where the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale.

THE CHANCELLOR. On the 15th of January, 1857, a bill was filed for the partition of the real estate of Garret Hiers, deceased. Hiers died intestate, leaving him surviving a widow, Sarah F. Heirs, four children, by the said Sarah, and two children, the issue of a former marriage.

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The master having reported that a partition could not be made without great prejudice to the owners of the premises, on the 18th day of January, 1858, by a decree of the court, it was ordered that the same should be sold, and that the master should, with the said premises, sell the estate in dower of the said Sarah F. Hiers, widow of the said Garret Hiers, in the same. In pursuance of this order, a part of the real estate was sold on the 26th and 27th of March, 1858, and the sale was confirmed on the 30th of April following. The residue of the land was sold on the 27th of November, 1858, and the sale confirmed on 1st of January, 1859. On the 30th of September, 1858, the widow filed a consent in writing, under her hand and seal, to accept, in lieu of her estate in dower, such sum in gross out of the proceeds of the sale of said lands as should be deemed by the Chancellor a just and reasonable satisfaction for such estate and interest. On or about the 18th of October, 1858, the widow died intestate. On behalf of her infant children it is insisted that, in making distribution of the proceeds of the sales of the land, they are entitled to receive such sum as may be deemed a just and reasonable satisfaction for the estate in dower of their mother in the land, in addition to their dividends as heirs at law. This claim is resisted by the children of Garret Hiers by his first marriage, who insist that, by the death of the widow prior to the decree for distribution, her interest, as well in the proceeds of the sale as in the land itself, was determined, and that the moneys arising from the sale must be distributed among the heirs without regard to her claim. So far as relates to the proceeds of the sale of that portion of the land which was sold after the death of the widow, it is clear that her children can have no claim in virtue of her right of dower. It is true that the estate in dower of the widow was, by a decree of the court, ordered to be sold, but in point of fact the estate was determined by the death of the widow before the sale. No sale of the dower right was ever made, and consequently there are no proceeds of the sale which the wi-

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dow could be entitled to have invested for her benefit, or in lieu of which she could receive a sum in gross.

But in regard to the sales which were made and confirmed in the lifetime of the widow, her children are entitled to receive out of the proceeds of the sale a just and reasonable satisfaction for their mother's interest. Under the act of 1846, (*Nix. Dig.* 576, § 23,) the widow's dower could only be sold in proceedings upon an application for partition upon the widow's signifying her assent to relinquish her dower, by writing under her hand and seal, before or at the time of the sale; and upon giving such assent, she became, by the terms of the act, entitled to have one-third of the proceeds of the sale invested under the direction and control of the court for her benefit during life. The right to the equivalent is, by the terms of the act, vested in the widow, upon her consent to the sale. By the act of 1855, (*Nix. Dig.* 578) the sale of the dower right may be made at the discretion of the court without the consent of the widow; and upon such sale being made, if the widow consent in writing before making the order of distribution to accept a gross sum in lieu of her estate, the statute requires that the court shall direct the payment of such sum in gross out of the proceeds of the sale. The right of the widow to receive such equivalent becomes vested upon her filing her consent to accept it. She is bound, by her consent, to such acceptance, and it is just that the obligation should be mutual. The right vested in the widow to receive a sum in gross for her estate cannot be divested by her death. It is tantamount to an agreement to relinquish her right to the estate and to the interest of one-third of the proceeds for life for a sum certain, not specified in the agreement, but referred to the discretion of the court, to be exercised upon fixed and well established principles.

The estate in dower is a favorite of the law, and as the doweress is divested of her estate in the lands by order of the court for the benefit of the heirs, it is just and equitable that the compensation in gross, which she agrees to

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accept in lieu of her estate, shall be deemed to be absolutely vested in her by her agreement to accept the equivalent which the law has offered to her acceptance. If the law had left to the widow her election whether or not to consent to a sale of her dower upon receiving a sum in gross in lieu of her estate, and she had given such consent, undoubtedly the widow would have had a vested right to such equivalent immediately upon the sale being made. That the law has deprived her of her estate without her consent, and merely gives her an election as to the mode of payment, does not impair her equitable title to the equivalent.

If she had voluntarily contracted for the sale of her estate for a fixed sum, her children would have been entitled to the benefit of the contracts. Upon the clearest principles of equity, she should stand in no worse position when her property has been sold without her consent.

But again, as between the widow and the heir, what title has the heir to this money. Undoubtedly, at the sale, the purchaser paid for the widow's estate what it was then estimated to be worth.

The value of the dower at that time was added to the price paid for the land. The purchaser has paid a larger price for the dower than it has proved to be worth. Had it been anticipated that the widow would have died within a year, the fund now in court would be less. What title have the heirs to this fund? Why should not the estate of the widow be entitled to the price for which her estate was sold? I entertain no doubt, either upon the language of the statute or upon the principles of equity, that the equivalent for the dower is vested in the doweress, and should go to her children in the distribution of the funds.

The value of the dower is to be estimated as it existed at the time of the consent given to accept an equivalent, and according to the principles adopted by the court in ascertaining the value of dower in other cases. Such was

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the rule in the Court of Chancery of New York under a similar statute, and I think the rule consistent with justice. It is to the interest of the parties interested in the land that the widow should consent to accept a gross sum in lieu of her dower, rather than to leave one-third of the proceeds locked up for an indefinite period, and exposed to the hazards of investment. It is important, therefore, that the party entitled to the life estate, as an inducement to receive an equivalent, should be made aware of the principles upon which her estate is to be valued, and the equivalent ascertained, unless, under special circumstances rendering such course inequitable, the value of the widow's interest in the premises should be ascertained on the principles of life annuities, in accordance with the practice of the court upon the sale of infants' lands. There should be a reference to a master to ascertain and report, in accordance with these principles, what would be a just and reasonable satisfaction for the widow's interest, who is entitled to receive the same, and the shares to which the parties are severally entitled.

OWEN MCFARLAND vs. THE ORANGE AND NEWARK HORSE
CAR RAILROAD COMPANY.

The charter of the defendants contained the following clause: "the president and directors of said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark."

Held, that this enactment relates not to the *route*, but to the *termination* of the road, and that thereby the road of the company was not excluded from being located in or through Market street.

McFarland v. Orange and Newark Horse Car Railroad Co.

This was a motion to dissolve an injunction.

Oliver S. Halsted, sen., for complainant.

Abraham O. Zabriskie, for defendants.

THE CHANCELLOR. The whole equity of the complainant's bill rests upon the ground that there was no authority for the location of the railroad in or through Market street, in the city of Newark. If the company were authorized by their charter to locate and construct their road through that street—if its construction then was authorized by law, it could be no nuisance, nor was the injury it occasioned to the complainant of a character which entitled him to relief by injunction.

The injunction was originally granted on the assumption that the charter of the company, by necessary implication if not in express terms, excluded the road from being located in or through Market street. Upon a careful examination of the charter, I am satisfied that there is no ground for that opinion. The language of the act (§ 7) is as follows: "the president and directors of the said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark." This enactment relates not to the *route*, but to the termination of the road. Its design was not to exclude the line of the road, but its terminus, from the district included between Market and Orange streets. Whether the language of the act be construed to fix the terminus at a *point* south of Market street, or at some point in a *street* south of Market, is immaterial. In either event the statute is complied with. It appears, by the answer, that although the line of the road is through

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Market street, its terminus is a *point* and in a *street* south of Market street.

There is authority, both from the legislature and from the corporate authorities of Newark, to construct the road in its present location.

The injunction must be dissolved with costs.

SAMUEL H. HORNER vs. JAMES T. JOBS.

An injunction staying proceedings in ejectment was granted on a bill setting up loss of title deeds. The answer denied fully all knowledge of deeds alleged to have been lost.

Held, that injunction should be dissolved.

A mere formal or technical denial of the charges of the bill is not, as of course, sufficient to dissolve an injunction.

The staleness of the *defendant's* claim, which he was enforcing at law, affords no ground for continuing an injunction against him. It is the claim of the *complainant* to which the equitable defence of a stale claim is applicable.

The motion was to dissolve the injunction which had been granted on the filing of the bill.

Joel Parker, for defendant.

J. F. Randolph, for complainant.

THE CHANCELLOR. The complainant claims to be the owner in fee of a farm, containing 140 acres of land, in the county of Ocean. The farm was conveyed to Fuller Horner, the complainant's father, from *Peter Sexton* and Sarah his wife, by deed bearing date on the 5th of January, 1811. The father continued in possession during his life, and died seized in or about the year 1845, when the title vested, by descent, in the complainant, as his only child and heir at law. The complainant remained in the quiet and undisturbed possession of the land until June, 1858, when the defendant commenced against him, in

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the Supreme Court, an action of ejectment to recover some part or share of the premises. The complainant thereupon filed his bill of complaint in this court, alleging a loss or destruction of his title deeds, praying a discovery from the defendant, and an injunction to restrain the proceedings at law. The defendant, having answered the bill, asks a dissolution of the injunction.

The answer, so far as a discovery is sought, is full, direct, and unequivocal. Whether it answers the whole equity of the bill, so as to entitle the defendant to a dissolution of the injunction, is the only matter of inquiry. From the statements of the bill and answer, not controverted, it appears that, in the year 1784, James Sexton, the elder, under whom both parties claim title, died seized of a tract of 211 acres, including the farm in question. He left two sons and four daughters. The sons divided the land between them, and on the 3d of June, 1803, executed mutual releases. Peter, one of the sons, under whom the complainant claims, took the 140 acres now in controversy, the residue of the tract going to the other son. Rebecca, one of the daughters of James Sexton, in the year 1797, married Richard Jobs, and by him had one son, the defendant, who was born on the 25th of August, 1798. She died in 1800, leaving the defendant her heir at law, to whom her real estate descended, subject to the estate of his father, Richard Jobs, as tenant by the curtesy. The father survived the mother fifty years, and died on the 20th of March, 1850. In 1858, the defendant commenced his action of ejectment for the recovery of his mother's interest in the lands in question as one of the heirs of James Sexton, and prosecuted the same until restrained by the injunction of this court.

The bill charges, upon information and the belief of the complainant, that Peter Sexton, before the conveyance by him to the complainant's father, and about the time of the division of the land between himself and his brother, purchased all the right of his sisters, and took

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from them, respectively, good and sufficient titles. The bill further charges, that after the death of Rebecca, her husband, Richard Jobs, conveyed her share, all his own interest, and the interest of his son (the defendant) to Peter Sexton, in consideration of \$480, with covenants of general warranty; and in order the better to secure Sexton, the said Richard Jobs, together with his father, James Jobs, about the time of the conveyance to Sexton, gave him a bond of indemnity against any claim that James Jobs, the present defendant, might ever set up against the property; and that, subsequently, James Jobs, the grandfather, Richard Jobs, the father, and James S. Jobs, the defendant (he acting by attorney), executed a deed, with covenants of warranty, transferring all their interest in the estate of the said Rebecca to Peter Sexton; that the defendant afterwards gave to the grandfather a release of all his interest in the estate; that the papers of the grandfather subsequently came into the possession of the defendant, and that the complainant is unable to procure the papers so as to perfect his chain of title, and cannot therefore safely go to trial at law without a discovery from the defendant.

These various charges were obviously made as the ground of a prayer for a discovery. They have been directly and explicitly denied by the answer of the defendant. He denies that any deed of conveyance for the premises was ever executed by his father or mother, or by himself or by his attorney; that no such papers were ever in his possession or under his control or within his knowledge. So far as the answer relates to the defendant's own deed or power of attorney, or facts within his knowledge, it is a full answer to the equity of the bill. So far as it relates to the execution of a conveyance by the mother, it does not fully answer the equity of the bill, for the fact is not within his knowledge. His mother died before the defendant was two years old, and in denying the execution of a conveyance by her, he could only

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have spoken as to his belief, not from his knowledge. A mere formal or technical denial of the charges of the bill is not, as of course, sufficient to dissolve the injunction.

If the defendant's case rested upon the answer above, or if there was any fact or circumstance in the case to warrant the belief, or to create an impression that the mother had conveyed her estate, I should retain the injunction to the hearing. But there is the strongest reason for believing that no such conveyance was ever made. In the releases executed by Peter Sexton and his brother, upon the partition of the land between them in 1803, it is recited that Peter had purchased his sister's share *from her husband*. There is no suggestion that she had joined in the deed—and this was some years subsequent to her death. And it is averred, in the bill of complaint, that the husband did, after the death of the defendant's mother, convey all his interest and all his son's interest in his mother's share of the estate to the complainant with covenants of general warranty, and that at the same time he, with his father, gave to Peter Sexton a bond of indemnity against any claim which the son might thereafter make for the estate of his mother. Why this conveyance with covenants of warranty from the husband, and this bond of indemnity against the claim of the child, if the mother had ever divested herself of his estate?

That part of the bill which seeks to raise an equity against the defendant, upon the ground that he received from his father and grandfather, for his support and maintenance, a sum equal to the value of the land, is fully met and denied by the answer. If it were otherwise, and the facts were admitted to be true as charged, they would not avail to destroy the defendant's title or prevent a recovery in ejectment, whatever equity they might raise in favor of the complainant for an account.

Nor will the fact that the complainant's title was on record charge the defendants with a knowledge of his title, or subject him or his estate to any equity in favor

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of the defendant, on the ground that his claim was not earlier made known to the complainant, or sought to be enforced against him.

Nor can the staleness of the claim or the lapse of time, or the statute of limitations, avail the complainant. The *defendant* is asking no relief at the hands of this court. He was seeking to enforce his legal rights in a court of law. The complainant is here asking the aid of this court. It is the claim of the complainant, not the title of the defendant, to which the equitable defence of a stale claim is applicable. No lapse of time can avail the complainant, unless it be a bar to the defendant's title under the statute of limitations. This defence will avail the defendant at law as well as in equity, and constitutes no ground for enjoining proceedings at law.

I find no ground on which to continue the injunction, nor do I see, in any aspect of the case, that its continuance can be of any avail to the complainant. He has had all the benefit of a discovery from the defendant that he can have. Every presumption in favor of his title which he can have in this court he can have at law. The statute of limitation will avail him there as well as here, and a further continuance of the injunction can only serve to procrastinate the cause, which has already been long delayed.

The injunction should be dissolved without costs.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

MAY TERM, 1860.

THE BROADWAY BANK vs. THOMAS McELRATH and others.

Shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the said corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the bailor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with a blank irrevocable power of attorney for the transfer thereof from the bailor to the bailee.

M. delivered to the complainants the certificates of certain stock of a corporation, accompanied by a power of attorney irrevocable for the transfer thereof, as collateral security for certain of his notes, and the renewals thereof. The charter of said corporation provided that its capital stock should be deemed personal estate, and "be transferable upon the books of said corporation;" and further, "that books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of said corporation." A creditor of M. then levied an attachment upon this stock. *Held*, that the transfer to the complainants was effectual as against such attaching creditor.

This case came on for final hearing on the bill, answer, and proofs. The facts fully appear in the opinion of the court.

Broadway Bank v. McElrath.

Gummere and Attorney General, for complainant.

Van Syckel and Beasley, for defendants.

THE CHANCELLOR. The property which forms the subject of controversy consists of fifty shares of the capital stock of the Trenton Iron Company, of the par value of one hundred dollars each, standing on the books of the company in the name of McElrath. On the second of June, 1854, the certificate of the stock, accompanied by a power of attorney irrevocable for the transfer thereof, was delivered to the Broadway Bank, as collateral security on loan of four thousand dollars, obtained by McElrath from the bank, upon his individual note at four months. The loan was made upon the agreement of McElrath to deposit the stock as a collateral security for the repayment of the loan, including as well the original note as all renewals thereof. The note was renewed, and the accruing interest paid, from time to time, until the 22d of November, 1857, when the last renewal was made.

On the 24th of August, 1857, the Hunterdon County Bank sued out of the Supreme Court of this state a writ of attachment against the estate of the said McElrath, as a nonresident debtor, by virtue of which the stock in question was attached as the property of McElrath. Judgment having been rendered in favor of the plaintiff in attachment, and also in favor of sundry applying creditors, the auditors in attachment were proceeding to make sale of the stock in question to satisfy those judgments when they were restrained by an injunction issuing in this cause. The complainants insist that they have an equitable lien upon the stock for the payment of the debt for which it was hypothecated as security. The defendants claim that they have acquired a valid title to the stock at law and in equity by virtue of the attachment.

The stock, irrespective of the complainants, was undoubtedly, under the provisions of the statute, the sub-

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ject of attachment. The judgment at law has established the claims of the plaintiff and the applying creditors in attachment. The validity of the proceedings under the attachment are not drawn in question. The defendant's right to the property is unquestioned, except so far as it conflicts with the prior rights of the complainants.

By the 5th section of the charter of the Trenton Iron Company, approved February 16th, 1847, (*Pamph. Laws* 61) it is enacted that "the capital stock of the said corporation shall be deemed personal estate, and be transferable upon the books of the said corporation;" and by the 9th section of the charter, it is further enacted, "that books of transfer of stock shall be kept, and shall be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the said corporation."

Independent of the provisions of the charter, the stock of an incorporated company is deemed personal estate, and may be transferred by a certificate of stock accompanied by a power of transfer. *Angell & Ames on Corp.* § 564.

And where it is provided by the charter or by-laws that the stock shall be transferred only upon the books of the corporation, there is a decided weight of authority in support of the position, that a *bona fide* transfer by delivery of the certificate is nevertheless valid as between vendor and vendee, that the equitable title passes by such transfer, and that the claim of the vendee is good in equity against the claim of an execution or attaching creditor of the vendor: such provision, whether by charter or by-law, is regarded as designed to protect the interests of the corporation, and as applying solely to the relation between the corporation and its stockholders. Its only office is held to be equivalent to that of the provision contained in the ninth section of the charter of the Trenton Iron Company, viz. "to afford evidence of the ownership of the stock in all elections and other matters submitted to the decision of the corporation," including all questions

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as to the ownership of the stock as between the corporation and its members. *Angel & Ames on Corp.* [354; *Bank of Utica v. Smalley*, 2 Cowen 770; *Gilbert v. Manchester Iron Co.*, 11 Wend. 627; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91; same case in error, 22 Wend. 348; *Quiner v. Marblehead Insurance Co.*, 10 Mass. 476; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390; 3 Howard 513; *Stebbins v. Phoenix Fire Insurance Co.*, 3 Paige 361; 3 Binney 394; *Grant v. Mechanics Bank*, 15 Serg. & R. 143; *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons 247; *United States v. Cutts*, 1 Sumner 133.

There is not an entire uniformity of authority upon the question, whether a transfer or pledge of stock as collateral security without a transfer upon the books of the company, as required by the charter, will protect the holder against the claims of an attaching creditor, though the weight of authority is decidedly in favor of the right of the assignee.

It is the well settled rule in New York, where this contract was made, and where the contracting parties had their domicile at the time of the contract, and the pledge of the stock by McElrath to the bank.

It was so expressly decided in this state long prior to the date of that contract. *Rogers et al. v. Stevens*, 4 Halst. Ch. 167.

So far as judicial determination could settle the question, it was settled prior to the pledge of this stock, both in the state where the contracting parties had their domicile and in the state where the corporation whose stock was transferred was chartered and transacted its business. The parties to the contract may fairly have relied upon the law, as thus settled, for the protection of their rights. It is of the utmost importance that questions so extensively and vitally affecting the rights of the business community should be regarded as settled by judicial decision, and not liable to be disturbed, except for the most cogent reasons. Upon the faith of decisions already made upon this very

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point, contracts have doubtless been entered into and securities taken to a very large amount. Whatever might be my conclusion as to the true construction of the statute, were the question now for the first time agitated, it would be alike unwise and unjust to overturn or impair rights acquired upon the faith of recognised legal principles.

I think it clear moreover, whatever might be the strict legal interpretation of the provision in question, that the legislature never designed it to impair the validity of a transfer of stock, as between the parties making it. It was not intended to introduce a new mode of acquiring title to stocks, much less to operate as a registry law, by furnishing conclusive evidence to the public of the ownership of the property. If such had been the design, it might have been expected that the legislature would have required that the books of transfer should be at all times open to public inspection, and the record, not in certain specified cases merely but in all cases, made evidence of ownership.

Nor does sound policy require such construction to be given to the act. The pledge of stocks as collateral security has become a prevalent, and to the borrower, especially, an advantageous mode of effecting loans. In manufacturing companies especially, where the business of the company is carried on by the stockholder, and where his capital is mainly or exclusively vested in the stock, and employed in the active operations of business, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the

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owner of stocks be deprived of the privilege of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property?

The objection is, that it will open the door to fraud, and deprive an execution or attaching creditor of the means of ascertaining the real ownership of the stock. It is worthy of notice that this clause requiring a transfer of stock on the books of the company was inserted in numerous charters long before the stock was made the subject of execution. But the objection, as applied to a transfer of stock, is of less weight than against a chattel mortgage, the chattel remaining in the hands of the mortgagor, which is held to be a valid security. *Runyon v. Groshon*, 1 *Beasley* 86.

The transfer book is not the only evidence of the ownership of stock. The certificate, which has always been deemed *prima facie* evidence of ownership, is the only evidence in possession of the owner, and where there has been no transfer, is the only recognised evidence of title.

It is urged that the contract for the pledge of this stock was executory merely; that it does not purport to transfer the ownership of the shares, but simply gives an authority to transfer upon failing to pay the debt: and hence it is further argued, that the stock cannot be held as a pledge, because that requires a transfer of possession. The contract between the parties was in no sense executory. It was fully executed according to the intention of the parties. The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be. The spirit and design of the contract was that the legal ownership of the stock should continue in McElrath; that he should remain a member of the corporation, with the right to receive the dividends upon the stock, to vote at all elections, and with all other rights pertaining to him as a stockholder and member of the company, and that the bank should hold the stock as collateral security for

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the payment of the loan, with the absolute and irrevocable right of transferring the legal ownership upon failure to pay the debt. The same objection existed in many of the reported cases, where the right of the party holding the certificate of stock as evidence of his claim was sustained against the claims of attaching or execution creditors. 3 *Binney* 394; 4 *Halst. Ch.* 167.

Such a certificate annexed to or accompanying a blank power of attorney we cannot doubt, not only according to the understanding of men in business, but upon well settled principles of law, passes by delivery an equitable title to a *bona fide* purchaser; nor can such purchaser be justly prevented from converting his equitable into a legal title by filling up and exercising the power, whenever he is entitled to do so by the nature and terms of the contract, under which the certificates were delivered to him. When the stock is sold absolutely his right then to perfect his title is immediate; when it is hypothecated, the right accrues when the debt meant to be secured becomes due and remains unpaid. Per ACKLEY, C. J., in *Fatman v. Lobach*, 1 *Duer* 361.

It is obvious moreover, that so far as regards the legal ownership of the stock, if the transfer upon the books of the company alone can constitute legal ownership, that the contract of sale is as fully executed by delivering the certificate, with the power of immediate transfer on the books of the company, as by a formal assignment accompanying the certificate.

The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is the holder for value without notice his title cannot be impeached. *Leavitt v. Fisher*, 4 *Duer* 1.

Aside from the general principles by which I think the case must be controlled, it is worthy of notice that the charter of the company, the stock of which is here the subject of controversy, is somewhat variant from many of

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those which have formed the subject of adjudication. In the case of *Fisher v. The Essex Bank*, 5 Gray 373, the act of incorporation declared that the stock of the bank should be transferable *only* at its banking house and on its books. The court say that the word "only" carries an implication, as strong as negative words could make it, that the transfer should be in no other mode. It was not to prescribe one mode, leaving others unaffected; it made that mode exclusive. The charter of the Trenton Iron Company contains no such exclusive language. It declares merely that the stock shall be transferable on the books of the company, and further provides that the books of transfer shall be evidence of ownership, as between the company and its stockholders. If the transfer on the books was designed to be the only evidence of ownership, the latter provision would seem to be unnecessary.

The right of the bank is in no wise prejudiced by the fact, that they appeared as applying creditors under the attachment, and presented their claim to the auditors.

The *bona fides* of their claim is not questioned, and they are entitled to the stock in question clear of the lien of the attachment.

Decree accordingly.

JACOB SCHENCK vs. ELIAS H. CONOVER and others.

If the party appealing from the final decree of this court file his appeal within ten days after such decree with the clerk of this court, it will prevent issuing process on such decree without the order of this court or of the Court of Appeals for that purpose.

If the appeal be not filed within the time above limited the motion to stay execution is addressed to the discretion of the court, and will be granted only upon good cause shown.

In a case of several mortgages to a large amount which were undisputed,

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and of subsequent judgments, some of which were in controversy, the court will not, on the application of the mortgagor, stay proceedings on the execution under the decree of foreclosure: but will order the surplus money to be brought into court to abide the result of the contest touching the judgments.

THE CHANCELLOR. The defendant, having appealed from the final decree in this cause, asks an order to stay further proceedings on the execution issued upon the decree until the hearing of the appeal.

By rule 20, § 2, if the party appealing shall, within ten days of the final sentence or decree, file his appeal with the clerk of this court, it shall prevent issuing process on the said decree without the order of this court or of the Court of Appeals for that purpose.

The appeal was not filed within the time limited by the rule, the writ of *feri facias* was regularly issued, and the power of the court is now invoked to arrest the execution of the writ in the hands of the sheriff.

The application is to the sound discretion of the court. By the practice of the English court of equity, as well as by the practice of this court, so far as regulated by statute, an appeal from a decree in equity, either interlocutory or final, does not stay proceedings in the court below or prevent the issuing of process without a special order for that purpose. *Huguenin v. Baully*, 15 *Vesey* 180, 184; *Way v. Toy*, 18 *Vesey* 452; *Waldo v. Caley*, 16 *Vesey* 206; *Willan v. Willan*, 16 *Vesey* 216; 2 *Smith's Chan. R.* 68.

By the New York practice, as it existed at and prior to the time of Chancellor Kent, an appeal in the first instance operates to stay proceedings on the point appealed from; and if the party wishes to proceed notwithstanding the appeal, he must make application to the Chancellor for leave to proceed. *Green v. Winter*, 1 *Johns. Ch. R.* 77; *Messonier v. Kauman*, 3 *Johns. Ch. R.* 66.

By either practice, whether the party shall be permitted to proceed notwithstanding the appeal rests in the discretion of the court.

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We follow the English practice, except so far as it may be modified by statute or by rule or established practice in this court. *West v. Paige*, 1 *Stockt.* 203.

Independent of the rule of this court, already referred to, the complainant would have been entitled to his execution, as of course, at any time after final decree, notwithstanding the appeal. By the rule, if the appeal be filed within ten days after final decree, it prevents the issuing of process without a special order for that purpose. If the appeal be not filed within that time the execution may issue, and proceedings thereon will not be stayed, except for good cause in the discretion of the court. If the court, in the exercise of this discretion, see that in case the decree should be reversed the party cannot be set right again—if the complainant proceeds to a sale under his execution—there is a strong reason for a stay of execution. If, on the other hand, the stay of execution is unnecessary to protect the rights of the appellant under the appeal, and must operate prejudicially to the complainant, the court ought not to interfere.

The bill was filed to foreclose a mortgage given by the defendant, Conover, to the complainant. The mortgage and the amount due upon it are undisputed. There was due, at the date of the master's report on the 30th of August, 1860, upon the complainant's mortgage \$6995.07. There was due at the same time to a prior mortgagee \$1717, and to a subsequent mortgagee \$3654. Neither of these mortgages is in controversy. They are all admitted to be just. There is no appeal from the decree, so far as it relates to the encumbrances. The whole controversy in the cause relates to the validity of certain judgments, which are claimed as liens upon the mortgaged premises subsequent to the lien of the mortgages.

The amount of undisputed mortgage debts established by the decree, including principal and interest, is \$12,366.07. The arrears of interest at the date of the master's report exceeded \$2500. Not a dollar of interest ap-

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pears even to have been paid upon either of the mortgage debts. There is no reason why the mortgage creditors should be longer delayed in the recovery of their claims by reason of the appeal. The whole controversy relates to the surplus remaining of the proceeds of the sale after the satisfaction of these encumbrances. The defendant's rights under the appeal will be fully protected by directing the sheriff to bring the surplus money, if any there should be after the payment of the mortgage debts, into this court to abide the decision of the Court of Appeals and the further order of the court.

The judgment debts directed by the decree to be paid out of the proceeds of the sale amount to \$9689, making the total encumbrance upon the mortgaged premises, at the date of the master's report, \$22,055.07. Should the decree be affirmed in the Court of Appeals, and these judgments be sustained as valid encumbrances on the property, from statements made upon the argument, there would seem to be just reason to apprehend that the proceeds of the sale will be utterly inadequate to satisfy all the encumbrances, and that the judgment creditors must sustain a serious loss. This constitutes an objection to tying up the fund in this court. It must, however, be done for the security of the appellant, unless the judgment creditors will give adequate security for the repayment of the amount received by them in case the decree should be reversed.

If the appellant desire it, an order will be made directing the surplus of the proceeds of the sale, after satisfying the mortgage debts, to be brought into court to abide the further order of the court.

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ASA MCPHERSON vs. GEORGE HOUSEL.

In a foreclosure suit the subpoena was returned with the usual affidavit of the nonresidence of the defendant. It appeared that the defendant had separated from his wife, who had gone with her children to her father, the complainant. The defendant, after boarding in the county of Hunterdon for a short time, left the state, and was confined for crime in the penitentiary of Pennsylvania.

Held, that the actual domicile of the wife was not the legal domicile of the husband: nor could it be regarded, contrary to the fact, as his actual residence within the meaning of the statute regulating the service of process.

B. Van Syckel, for complainant.

G. A. Allen, for defendant.

THE CHANCELLOR. Upon a bill for foreclosure, a final decree was made on the twelfth of July, 1860. On the thirtieth of August, upon the petition of the defendant, an order was made upon the complainant to show cause why the decree and all the proceedings in the cause subsequent to the filing of the bill should not be set aside for illegality and irregularity specified in the petition, and that in the mean time the sheriff should refrain from selling the premises in pursuance of the decree.

The first and most material ground of illegality alleged in the petition is, that at the time the subpoena was issued the defendant was temporarily absent from the state; that his family resided in the county of Hunterdon, into which the process issued, and the subpoena might and ought to have been secured according to law; that all these facts were known to the complainant, but that he caused the subpoena to be returned by the sheriff on the same day he received it, with the usual affidavit that the defendant was a nonresident, and that, in order to prevent the existence

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of the suit from coming to the knowledge of the defendant's agent, the complainant procured the order of publication in the cause to be published in a newspaper published in the city of Trenton, and not in the county of Hunterdon, where the lands lie and where the parties reside.

The facts alleged in the petition constitute a gross case of the fraudulent use and abuse of the process of the court, and if proved would have required a prompt and decisive remedy.

But there is no evidence offered by the defendant in support of the facts alleged in the petition. Neither the petition nor the affidavit annexed are sufficient evidence of the charge. The evidence on the part of the complainant shows that the defendant, who had married the complainant's daughter, had abandoned his wife and children eighteen months prior to the issue of the subpoena, but they have since resided with and been supported by the complainant; that the defendant, for a short time before he last left the state, boarded with a person by the name of Bush, in the county of Hunterdon, but that Bush changed his place of residence prior to the service of the subpoena; that before his removal the defendant had left the state, and was confined in the penitentiary of Pennsylvania for crime.

It is clear, upon this statement of facts, that the subpoena could not have been lawfully served, as required by the statute, at the dwelling house or usual place of abode of the defendant. The residence of Bush could in no sense be regarded as his usual place of abode. He had ceased to board there—he had in fact never made his home where Bush resided at the time of serving the subpoena, nor could the house of the complainant, where the defendant's family resided, be regarded as his dwelling place. He did not in fact reside there; he had separated himself from his family. It was neither his actual nor his legal residence. The domicile of the husband is *prima fa-*

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cie, at least, the wife's legal domicile wheresoever she may be personally resident, and it seems that the citation of the wife at the domicile of the husband is sufficient to found the jurisdiction of the ecclesiastical court in a suit for separation. *Chichester v. Donegal*, 1 *Addams* 5; *Shelford on Marriage and Divorce* 488.

But the actual domicile of the wife cannot be the legal domicile of the husband, much less can it be regarded, contrary to the fact, as his actual residence or place of abode within the meaning of the statute regulating the service of process. If the complainant had caused the subpœna to be served at his own house upon the wife of the defendant under the state of facts proved to exist in this cause the service would have been clearly invalid. The defendant was not a resident of the state, he was not personally here, nor had he any actual residence or place of abode within the state between the issuing of the subpœna and the time of its return. The return of the subpœna therefore, as made by the sheriff, was not illegal, nor does the publication of the order for the defendant to appear in a newspaper published in another county from that in which the lands lie render the decree illegal or irregular. The practice is to direct the publication to be made in the county where the lands lie, but the publication in a different county does not conflict with the statute; and where there is no suggestion of fraud or unfair practice, it does not invalidate the proceeding. The proceedings cannot be set aside on the ground of illegality or irregularity.

But notwithstanding the regularity of the proceedings, I should have no hesitation in opening the decree, and admitting the defendant to answer, if there was any proof, or even a probability, of there being any error in the decree. The petition, which is signed by counsel, states, upon information, that the decree is for a larger amount than is actually due. But the defendant, in his affidavit, does not so state; the fact is expressly denied

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by the complainant, and if true it might readily have been verified by the production of the papers or by oral proof.

The rule to show cause must be discharged with costs.

JENNINGS vs. JENNINGS.

To establish a case of desertion sufficient to authorize a divorce, it should appear that the wife left her husband of her own accord, without his consent and against his will, or that she obstinately refused to return without just cause on the request of her husband.

Desertion cannot be inferred from the mere unaided fact that the parties do not live together.

A. W. Bell, for petitioner.

THE CHANCELLOR. The petitioner asks a divorce from the bond of matrimony for wilful, continued, and obstinate desertion on the part of the defendant.

The evidence shows that the parties were married about the year 1851, and that they lived together about eighteen months or two years. The defendant then returned to her mother's house, where, so far as appears by the evidence, she still remains. Two witnesses only have been called to support the charge of desertion. One of them, an uncle of the petitioner, says, that after the defendant left her husband's house, he never saw them together. He, the witness, has talked with her and her mother, and tried to get her to come back, but not at her husband's request. The other witness, a brother-in-law of the petitioner, says the defendant left her husband, and went back to her mother's. I think he tried to get her to return and live with him, and she refused; I know that

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he went to see her a number of times, and tried to get her to return. How this knowledge was acquired, he does not state. His previous statement warrants the belief that he did not know the fact of his own knowledge, but derived it from the statement of others. This is the whole evidence offered in support of the petition.

There is no evidence whatever of the circumstances under which the defendant left her husband's house. For all that appears, the separation may have been voluntary. The defendant may have returned to her mother's house with the husband's consent or at his request. The evidence is by no means satisfactory that the husband ever asked or desired her to return to him. To establish a case of desertion, it should appear that the wife left her husband of her own accord without his consent and against his will, or that she obstinately refused to return without just cause on the request of her husband.

Voluntary separation does not amount to desertion, nor can desertion be inferred from the mere, unaided fact that the parties do not live together. *Bishop on Marriage and Divorce*, § 511.

To decree a divorce upon evidence so unsatisfactory and inconclusive would open the door to the grossest abuse in the exercise of the power of the court.

The application must be denied.

CHARLES F. COX vs. JOHN PETERS and MR. JOHNSON.

When a partnership is dissolved by mutual consent, or determined by the will of either party, a Court of Chancery will not *as of course* assume the control of the business, and place it in the hands of a receiver. This course will be taken only where it appears necessary to protect the interest of the parties.

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This case came before the court on a motion to dissolve the injunction, which had been granted on filing the bill.

M. Beasley, of counsel with complainant.

F. B. Chetwood, of counsel with defendant.

THE CHANCELLOR. The defendants ask a dissolution of the injunction issued in this cause, upon the ground that the equity of the bill is denied by the answer.

The bill charges that Peters, in violation of the articles of partnership, had failed to advance the sum of \$5000, as a capital for the firm; that the defendants had fraudulently combined for the purpose of excluding the complainant, and had in fact excluded him from participation in the business of the firm and from receiving his share of the profits.

These charges constitute the whole equity of the complainant's bill. I think that they are all fully denied by the answer, and consequently the injunction must be dissolved.

It is urged, on the part of the complainant, that upon the case made by the answer, a receiver must be appointed, which will render the continuance of the injunction necessary. By the articles of partnership, the business was to be continued "for the term of — years." The complainant charges, in his bill, that at the time of the agreement, it was understood that the partnership should continue for a number of years, and that three or five years was suggested as a proper period for its continuance; but it was not definitely settled, and the blank was to be filled thereafter. The defendants, by their answer, allege that no time for the continuance of the partnership was suggested or agreed upon at the time of entering into the agreement; that it was then purposely left in blank to be agreed upon thereafter, and that it has

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never been agreed upon. It is thereupon insisted that, as the partnership is not to endure for a time certain, either party may dissolve it at his pleasure; that the court will treat it as already dissolved, and in that event the appointment of a receiver and the continuance of the injunction is a matter of course.

It has been held that, where either party had a right to dissolve the partnership upon a bill filed for the purpose of closing its affairs, the appointment of a receiver is a matter of course. *Law v. Ford*, 2 Paige 310; *Marten v. Van Schaick*, 4 Paige 479.

The principle must, I think, be adopted with some qualifications. Upon what principle is it, if one dissatisfied partner chooses to withdraw from the firm, that the entire management of the business should be taken from the hands of other partners, and vested in a receiver? If the other partners are open to no impeachment on the ground of integrity or responsibility, why should they be deprived of the control of their affairs, and be subject to the costs and charges of a receiver?

In *Harding v. Glover*, 18 Vesey 284, the Chancellor said, "I have frequently disavowed, as a principle of this court, that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of the duty of a partner or of the contract of partnership."

And in *Butchart v. Dresser*, 4 De Gez; Macn. & Gordon 543, cited in *Edwards on Receivers* 324, it is said the authority of a partner continues after a dissolution for all purposes of winding up, and it is only where he is exercising unduly any power which he has as a partner that the affairs of the partnership would be wound up under the discretion of the court and a receiver appointed.

The true principle is that adopted by Chancellor Williamson, viz. that where a partnership is dissolved by mutual consent, or determined by the will of either party, a Court of Chancery will not as of course assume the con-

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trol of the business, and place it in the hands of a receiver. A receiver will be appointed only where it appears necessary to protect the interest of the parties. *Renton v. Chaplain*, 1 Stockt. 62; *Birdsall v. Colie*, 2 Stockt. 68.

But admitting the existence of the general rule, it is based on the principle that each partner has an equal right to the possession and control of the partnership effects and business. But by the article of partnership between these parties, the whole capital was to be advanced by Peters, the business to be conducted in his name, and owned alone by him. The entire capital was in fact advanced by him. And whatever may be the rights or claims of creditors as against the property, as between the partners themselves, the entire capital advanced, after the payment of debts, belongs to Peters. The complainant has no interest in the property upon the dissolution of the firm beyond his share of the profits.

Under such circumstances, where there is no suggestion of insolvency or irresponsibility, and no proof of fraud, there can be no equity in wresting the management of the property from the hands of the real owner, and placing it in the hands of a receiver. As the case now stands, there is no necessity for the appointment of a receiver, and no reason for the continuance of the injunction upon that ground. The partnership still continues, and upon the case made by the answer, there is no ground for the interference of the court with the management of the concerns of the partnership by the partners themselves. When a dissolution is decreed, a receiver may, if necessary, be appointed.

The injunction is dissolved with costs.

Collard v. Smith.

COLLARD vs. SMITH and WIFE.

The court will not extend the time for answering in order to admit the defence of usury.

Where the time has been extended by order of the court without notice to complainant the court will modify the order, so as to exclude the defence of usury.

When after the time for answering has expired, the complainant grants an extension, the defence of usury will not be permitted to be set up. *Contra* where such consent is given before the defendant is in *laches*.

Where husband and wife are made defendants to a bill in equity, the husband must appear for both, and the complainant is entitled to a joint answer.

If the husband is unable to put in a joint answer, or if the wife desire to answer separately, or the husband is not in a situation to answer for her, an order for a separate answer must be obtained.

If either husband or wife answer separately, without an order authorizing it, such answer will be suppressed as irregular.

The answer must not only be joint, but must be sworn to by the wife, or it will be irregular; but the irregularity will be waived by the complainant filing a replication.

This was a motion to suppress answer.

P. D. Vroom, for complainant.

Ransom, for defendant.

THE CHANCELLOR. The complainant moves to suppress the defendants' answer. First, on the ground that it sets up usury as a defence, and was filed after the time limited by law, the time for answering having been extended by the assent of the complainant's solicitor, at the solicitation of the solicitor of the defendant, and without stating the fact that usury was intended to be set up as a defence.

The court will not extend the time for answering in order to admit the defence of usury. And where the time has been extended by order of the court, without notice to the complainant's solicitor or without his consent, the court will modify the order, so as to exclude the

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defence of usury. The same principle, it is insisted, applies where the time is extended by consent of counsel without the order of the court. If the time for pleading had expired when the consent for extending the time was given the defence of usury would not be permitted to be set up. It may be presumed that the complainant's solicitor did not intend to prejudice his client's interest by the consent. The defendant ought not to be permitted to gain an advantage by the indulgence of his adversary. Had he applied to the court for time after the expiration of the time for pleading he would not have been permitted to plead usury. The consent of the plaintiff's solicitor to an extension of time should give no greater advantage. In this case the consent was given before the time for pleading had expired. It is a general consent, not limited as to the matter of the defence. To deprive the defendant of any lawful defence under these circumstances would prejudice his rights. At the time the consent was given he had a right to set up usury or any other defence. Had the consent for an extension not been given, the answer might have been filed within the time limited by law. If a general order for extension had been made by the court under like circumstances, the defendant would not have been deprived of his right to set up usury.

The complainant asks to suppress the answer on the further ground, that the defendant, Smith, has answered alone instead of filing a joint answer for himself and his wife.

Where a husband and wife are made defendants to a bill in equity, the husband must appear for both, and the complainant is entitled to a joint answer. *Wyatt's Prac. Reg.* 37, 53; 1 *Newl. Prac.* 109; 1 *Daniel's Chan. Prac.* 548; 1 *Barb. Chan. Prac.* 82.

If the husband is unable to put in a joint answer, or if the wife desire to answer separately, or the husband is not in a situation to answer for her, an order for a separate

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answer must be obtained. 2 *Mad. Prac.* 269; 1 *Smith's Prac.* 253; *Cooper's Eq. Pl.* 24; *Mitford's Eq. Pl.* 83; *Story's Eq. Pl.* § 71.

If the wife puts in an answer separately from her husband, the court, on motion of the complainant, will suppress it on the ground of irregularity. *Perine v. Swaine et ux.*, 1 *Johns. Ch. R.* 24; *Robbins v. Abrahams and wife*, 1 *Halst. Chan. R.* 16; 1 *Ch. R.* 68.

So if the husband answer separately, without an order authorizing it, the answer will be ordered to be taken from the files as irregular. *Leavitt v. Cruger*, 1 *Paige* 421; *Gee v. Cottle*, 3 *Mylne & C.* 180; *Bilton v. Bennett and wife*, 4 *Simons* 17.

And the answer must not only be joint, but must be sworn to by the wife as well as by the husband, or it will be suppressed for irregularity. But the irregularity will be waived by the complainant's filing a replication. *Fulton Bank v. Beach*, 2 *Paige* 307; *S. C.*, 6 *Wend.* 36; 2 *Mad. Prac.* 269; *Duke of Chandos v. Talbot*, 2 *P. Wms.* 371.

In the recent case of *Allen and Stevens v. Smith and wife*, where the husband filed a separate answer without the wife, the answer was, upon motion, ordered to be suppressed, and a decree *pro confesso* entered against the defendants for want of an answer. This order, however, was made upon the ground that the defendant did not appear or apply for leave to put in a joint answer, although notice of the application was given, and the hearing continued from time to time. The regular practice is, as appears from the cases above cited, where the answer is suppressed as irregular, to give the defendants an opportunity of putting in a joint answer, on application for that purpose.

In practice, especially where the wife's separate property is not involved, it is usual to receive the defendant's separate answer. *Garey v. Wittingham*, 1 *Sim. & Stu.* 163. But this must be with the concurrence of the plaintiff. His reply, his replication waives the irregularity. He is

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entitled to a joint answer, and if he require it, it must be put in, unless the order of the court be obtained to answer separately.

It was urged, upon the argument, that the only remedy of the complainant is to proceed against the husband for a contempt. This course may be adopted to compel the answer by the wife, but the separate answer of the husband will also be ordered to be suppressed and taken off the file. 1 *Barb. Prac.* 82; 1 *Dan. Prac.* 569.

The separate answer of the defendant must be suppressed for irregularity.

THE PRESIDENT, MANAGERS, AND COMPANY FOR ERECTING A
BRIDGE OVER THE RIVER DELAWARE AT OR NEAR TRENTON
vs. THE TRENTON CITY BRIDGE COMPANY and others.

Upon principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two states can only be conferred by the concurrent legislation of both states.

When the power to make and maintain such bridge, and take tolls thereon, has been given by the joint legislature of both states, the principle could hardly be admitted, that either state, by its separate legislation, could declare that no other bridge should be built across such river within certain limits, and thus render the franchise exclusive.

By the agreement entered into between the states of New Jersey and Pennsylvania, the river Delaware, in its whole length and breadth, is to be and remain a common highway equally free and open for the use of both states, and each state is to enjoy and exercise concurrent jurisdiction within and upon the water between the shores of said river. Both states concurred in granting to complainants the right to erect and maintain their bridge, and take tolls thereon. The legislature of New Jersey afterwards passed an act declaring "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges across the said river Delaware at any place or places within three miles of the bridge to be erected."

Held, that even if it was the intention that this act should take effect without the assent of the state of Pennsylvania, that it is void on the

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ground that it is in contravention of the agreement above mentioned between the two states. As neither state, by the exercise of her sole jurisdiction, has the right, by the terms of the agreement, to grant the franchise, so neither can lawfully contract to refuse to grant it.

Under the circumstances, as exhibited in the case, it was *further held*, that the act of 1801, which conferred the exclusive privilege on the complainants, was not designed by the legislature of New Jersey to go into effect until the same had received the assent of the legislature of Pennsylvania.

Whether a corporation has violated its charter or forfeited its franchise, is a question solely for the determination of a court of law.

But when a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for ordinary travel.

This case came before the court on a motion for an injunction, and was argued on bill and answer.

M. Beasley and *Attorney General*, for complainants.

B. Gummere and *P. D. Vroom*, for defendants.

THE CHANCELLOR. The complainants are the proprietors of an existing bridge across the river Delaware at Trenton. They were incorporated by the concurrent legislation of the states of New Jersey and Pennsylvania, and claim and exercise the unquestioned right of taking tolls upon the said bridge by the authority of both states. They claim to have the *exclusive* franchise of having a bridge and of taking tolls for the distance of six miles up and down the river, so that no other bridge can be erected within three miles of their bridge upon either side of it. The defendants are also a body politic, created by the concurrent legislation of both states, with authority to erect a bridge across the Delaware at the city of Trenton. They are now engaged, under the provisions of their charter, in erecting a new bridge across the river within a mile of the complainants' bridge, and which it is ad-

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mitted will divert a portion of the travel which now crosses at the old bridge. The complainants ask a perpetual injunction to restrain the defendants from erecting the bridge now in the course of construction, or any bridge whatever, within three miles of the existing bridge in violation of their chartered rights. Both parties have express legislative sanction for their respective claims. The complainants rest their claim to the exclusive franchise upon the authority of a grant from the legislature of New Jersey only. The defendants claim their franchise under the authority of a grant from both states. The complainants' grant is prior in point of time, and if valid, is fatal to the claim of the defendants.

Two questions are to be considered.

I. Are the complainants invested with the *exclusive* franchise of having a bridge and taking toll within the limits claimed in their bill.

II. If they are, are they entitled to the exercise of the restraining power of this court to protect them in the enjoyment of their franchise.

Before proceeding to a direct examination of these questions, it is well to notice, as preliminary to the main inquiry, that no reliance is placed by the complainants in support of their claim upon the doctrine, that the grant of the franchise of taking tolls by the states of New Jersey and Pennsylvania raises, by necessary *implication*, an *exclusive* grant. They claim no authority whatever, express or implied, from Pennsylvania for their *exclusive* franchise. Both in their bill and upon the argument they rely for their exclusive privilege solely upon the express grant of the legislature of this state. The doctrine, therefore, that the grant of a franchise necessarily implies that government will not directly or indirectly interfere with it, so as to destroy or materially impair its value, and that an interference by the creation of a rival franchise would be in fraud of the grant, is in no wise drawn in question in this case.

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On the other hand, the defendants do not deny that, if the complainants are invested under their charter with the exclusive franchise claimed in their bill of complaint, any law destroying that franchise, or materially impairing its value, is unconstitutional and void. The principle has been so repeatedly recognised by the highest judicial tribunals of the Union, and is so firmly established by a firm course of judicial decision in New Jersey, that it cannot be regarded in this court as an open question. *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

These positions being adopted as settled or admitted principles in the conduct of the inquiry, the field of investigation is reduced to a narrow compass. Had the legislature of New Jersey power to confer upon the complainants the *exclusive* franchise claimed in their charter? And if they had the power, has it been exercised?

The complainants claim the franchise of having a bridge across the river Delaware, connecting the states of New Jersey and Pennsylvania, and of taking tolls thereon. The river is the boundary between the two states, a public navigable river, and upon principles of international law, the middle of the channel forms the line of separation between the territories of the adjacent states. *Wheaton's Elements of International Law* 252. By the agreement between the two states, made and ratified in 1783, it is declared—

1st. That the river Delaware, from the station point or northwest corner of New Jersey to the place upon the said river where the circular boundary of the state of Delaware toucheth upon the same, in the whole length and breadth thereof, is and shall continue to be and remain a common highway, equally free and open for the use, benefit, and advantage of the said contracting parties; provided nevertheless, that each of the legislatures of said states shall hold and exercise the right of regulating and guarding the fisheries of the said river Delaware annexed

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to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted, during the season for catching shad, by vessels riding at anchor on the fishing ground, or by persons fishing under claim of a common right on said river.

2d. That each state shall enjoy and exercise a concurrent jurisdiction within and upon the waters, and not upon the dry land, between the shores of said river. *Nix. Dig.* 825.

Independent of the provisions of this agreement, upon principles of public law, it would seem to be a principle too clear to admit of doubt, that the power of erecting a bridge within the territories of both states, and of taking tolls thereon, could only be conferred by the concurrent legislation of both states. Neither state can, of its own authority, authorize a corporation to place piers, to erect a bridge, and construct a highway over the navigable waters and within the territory of an adjacent state, much less can it confer upon such corporation the franchise of taking tolls within the territory of such state. That franchise is a branch of the sovereign prerogative. The conferring of it is an exercise of sovereign power, and the right can only be exercised within the territory of the sovereignty that confers it. The principle, that New Jersey, alone, could neither confer the power of building the bridge or of taking tolls within the territory of Pennsylvania, is too clear to admit of dispute or to require an authority in its support. The principle was recognised and acted upon in the case of *Middle Bridge Corporation v. Marks*, 26 *Maine R.* 326.

It is not understood that the counsel of the complainants deny this principle. They claim, indeed, that their clients have the right of maintaining the bridge and of taking tolls by the joint legislation of both states, and that, having such right conferred, either state may make the franchise exclusive. Their position, if correctly understood, is their having acquired the undoubted fran-

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chise of having the bridge and taking tolls by the legislative authority of both states ; either state may make that right exclusive by contracting to grant no other charter. They may contract to do what without contract they may lawfully do, *viz.* refuse to grant any further franchise. The position, though certainly plausible, does not seem to me to be tenable. It amounts to this, that although the consent of both states is necessary to confer the franchise of taking tolls at any given point upon the river, yet that right once granted, either state may, at its pleasure, by its own legislation and for its own advantage, make that grant exclusive throughout the whole extent of the river. Irrespective of the terms of the agreement of 1783 between the two states, I repeat that I should hesitate to accept the position as tenable.

But the case is made much stronger against the complainants by the terms of the agreement between the states. It is thereby expressly declared that the river Delaware, in its whole length and breadth, is to be and remain a common highway, equally free and open for the use, benefit, and advantage of both states, and that each state shall enjoy and exercise a concurrent jurisdiction within and upon the water between the shores of said river. Now, if it be admitted that it is not the necessary construction of this agreement that it prohibits each state, upon its sole authority, from authorizing the construction of a bridge, even from its own shore to the centre of the river within its own territory, provided such bridge does not interfere with the navigation of the river as a highway, such construction is certainly warranted by the terms of the agreement. It may, perhaps, be held that each state might, without a violation of the contract, authorize the erection of a bridge to the centre of the river within its own territory, and the taking of tolls thereon ; and yet such is not the practical construction which has been given to its terms. Neither state has ever attempted to make such a grant ; on the contrary, it is believed that in

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the charters of the numerous bridges which now span the river from the north station point to tidewater, each state has invariably granted the privilege of building the bridge and of taking tolls, not only within its own territory but from shore to shore, thus exercising, in the language of the agreement, concurrent jurisdiction between the shores of the river. In the charter of the complainants, power is not given by the legislature of New Jersey merely to erect a bridge within the limits of this state, to unite with a structure authorized by the legislature of Pennsylvania within the territory of that state, but power is given to erect the bridge across the river from shore to shore, and the grant is made upon the express condition that it shall not be operative until the legislature of the state of Pennsylvania shall confer the like power and authority to erect the said bridge, and extend the same from the shore on the west side of the river across the same to its opposite shore, thus treating the franchise of erecting the bridge within the shores of the river as an entirety to be granted only by the concurrent legislation of both states. If, then, New Jersey, by the exercise of her sole jurisdiction, had no right, by the terms of the agreement, within the shores of the river, even within her own territory, to grant the franchise, can she lawfully contract to refuse to grant it? Does not the right of refusing to grant involve necessarily the power of granting? But the contract not to grant to others involves the grant of a franchise to the complainants, and, as has been said, the state, by virtue of its sole authority to grant such franchise. I conclude, therefore, that the alleged grant of the franchise claimed by the complainants by the sole authority of New Jersey, without the consent of Pennsylvania, was invalid and inoperative.

But admitting the power of the legislature to grant the franchise, was the grant made or intended to take effect without the consent of the legislature of Pennsylvania?

The complainants claim to be a corporation, and to ex-

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ercise their corporate franchises by virtue of an act passed by the legislature of New Jersey on the 8d of March, and ratified by the state of Pennsylvania on the 4th of April, 1798. *Pamph. L. of N. J.* 321; 5 *Carey & Bioren's Laws of Penn.* 348. The act does not directly incorporate the company, but authorizes the governor, when it shall be certified to him that a certain number of shares of stock shall have been subscribed, to create and erect, by letters patent, the subscribers into a body politic and corporate. By the last section of the act, it is enacted as follows: "Nothing in this act shall be deemed, taken, or construed to authorize or empower the governor to incorporate or empower any persons subscribing as aforesaid, or shall give any power or authority to such subscribers to do any act, matter, or thing herein mentioned, until such time as the legislature of the state of Pennsylvania shall by law vest the *like* powers and authority in such subscribers to erect the said bridge, and extend the same from the shore on the west side of the said river, at or near Trenton, across the same to its opposite shore, with as full and ample powers, privileges, franchises, and emoluments as to the subscribers are herein given; and the said subscribers, having such authority, shall be incorporated as aforesaid."

The original act of both states confers upon the corporation the same powers, privileges, and franchises, and contains the same provisions, with the exception of the 9th section of the act of this state, which was inserted in its passage through the house of assembly on the petition of a citizen of Trenton, praying that, if the law should pass, the company should be required to build the bridge at the head of or above the falls at Trenton, or that a clause should be inserted in the bill by which the company should be compelled to make compensation for any damages occasioned by building the bridge. *Minutes of Assembly, February 15th, 1798, p. 32.*

It is abundantly manifest from the provisions of the act

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of 1798, as adopted by both states, not only that all the corporate powers and franchises of the company were in fact conferred by the concurrent legislation of both states, but that the assent of each state was expressly required and declared to be necessary by the legislature of the other to the validity of the grant.

This act contains no grant of an exclusive franchise. But, on the 26th of February, 1801, the legislature of New Jersey passed an act to alter and amend the act of 1798. This act contains four sections, the 4th and last of which is as follows: "It shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges across the said river Delaware at any place or places within three miles of the bridge so to be erected by virtue of the before recited act." This act contains no provision, in express terms, rendering the assent of the legislature of Pennsylvania necessary to its validity. The complainants claim that the fourth section operates as a valid grant of the *exclusive* franchise of having a bridge and taking toll within the designated limits.

If the views which have already been expressed are correct, the legislature had no power to make such grant without the assent of the legislature of Pennsylvania. If such assent was necessary, the grant would not only be inoperative without it, but the court would be bound to presume not that the legislature passed an illegal and void act, but that it was in contemplation of the subsequent assent of the legislature of Pennsylvania. The terms of the act itself, and the circumstances under which it was enacted, lead to the same conclusion.

By the act of 1798, the same powers, franchises, and privileges were granted by the legislatures of both states. The act, as passed in each state, contains the provision already cited, *viz.* that the act should be inoperative until such time as the legislature of the other state should confer on the corporation the like power and authority,

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&c., with as full and ample powers, privileges, franchises, and emoluments as are given in said act. It was in fact a condition of the grant by each state that the other should make a like grant. The condition failing, the grant failed. Now was the condition fulfilled by a literal compliance with its terms? If a similar act had been passed by Pennsylvania, which was void by the constitution of that state, or if a similar valid act had been passed by that state, but repealed or essentially modified before the grant of the letters patent, the condition would not have been fulfilled, and the act of this state would have been inoperative and void.

Now the act of 1801 was passed before the grant of letters patent by either state—before the company was incorporated or the charter accepted. The company was erected into a corporation by letters patent, granted by the executive of New Jersey, on the 1st of August, 1803, and by the governor of Pennsylvania, on the 16th of the same month. The letters patent of the executive of this state refer both to the original act of 1798 and the act of 1801, and authorize the corporation to have, hold, exercise, and enjoy the powers, authorities, rights, privileges, and franchises in the said *acts* given, granted, and specified.

The letters patent of the governor of Pennsylvania contain no such clause. They erect the company into a corporation with the powers and franchises conferred by the act of 1798, and none other.

The issuing of the letters patent was an executive act—the mere execution of a power—and could confer no right or franchise not granted or authorized by the acts of the legislature. If, then, the act of 1801 was intended to take effect, and did take effect, without the assent of Pennsylvania—if it materially altered or was repugnant to the powers, provisions, and franchises granted by the act of 1798, then the executive of Pennsylvania had no authority to grant the letters patent or to incorporate the company.

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The condition upon which the legislature of that state had authorized the charter had failed, viz. that New Jersey should confer similar powers and franchises upon the corporation. Now the act of 1801, and every section of the act, does alter most materially the powers, privileges, and franchises of the corporation and of the individual corporators.

By the 3d section of the act of 1798, it was provided that no stockholder should have over twenty votes, whatever might be the number of his shares. By the 1st section of the act of 1801 this provision was repealed, and each stockholder declared to be entitled to one vote for every share held by him, thus changing the powers of the stockholders and the control of the corporation. How was the company ever to be organized? Had the stockholders different rights in the two states, and did those rights depend upon the place of meeting? The 2d section of the act of 1801 confers upon the corporation powers of forfeiting stock and of suing the holders of shares for nonpayment of instalments not conferred by the original act.

By the 16th section of the act of 1798, if at the end of two years the clear income of the bridge would not bear a dividend of six per cent. per annum upon the capital expended, the company were authorized to increase their tolls so as to raise the dividends to six per cent. per annum, and maintain such increased rate of tolls, provided the clear income would not produce a dividend of more than fifteen per cent. per annum. By the 3d section of the act of 1801 this section is repealed. The franchise of taking such increased rate of tolls is taken from the corporation, and the privilege is conferred upon the states of New Jersey and Pennsylvania, or either of them, of taking the bridge and its appurtenances at a valuation after the expiration of fifteen years from its completion.

The 4th section of the act of 1801 contains the grant of the exclusive franchise claimed by the complainants, and which forms the subject of the present controversy.

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Can it be conceived that the legislature would have passed that act, or that the company would have accepted it, intending that it should go into operation without the assent of the legislature of Pennsylvania? Would the legislature have altered the rights of the stockholders, impaired the franchises, made provision for the purchase of the bridge and its appurtenances by New Jersey, without the consent of the legislature of Pennsylvania? Would the company have accepted such act, knowing that the ratification of the charter by Pennsylvania and all the franchises of the company were dependant upon the condition that the same powers and franchises should be granted by New Jersey? The act of 1801 must have been passed by the legislature, and accepted by the company, in contemplation of its being concurred in by the legislature of Pennsylvania. Without such assent it neither had, nor was intended to have, any vital power.

I am of opinion, therefore, that, by the act of 1801, the complainants are not invested with the *exclusive franchise* claimed in their bill.

There is another question raised by the answer, upon which (the parties are entitled to the opinion), in justice to the parties, it is right that an opinion should be expressed. The answer alleges that, in violation of the Charter, the bridge of the complainants has been converted to the purposes, and is constantly used for the transit of locomotives with trains of cars; that the bridge is thereby, for the purposes of ordinary travel, rendered inconvenient, insecure, and dangerous, and the rights, interests, and convenience of the public in the enjoyment of the bridge impaired, and the passage of the bridge by ordinary travel between the two states interrupted.

Whether the complainants have violated their charter or forfeited their franchise is a question solely for the determination of a court of law, and not within the cognizance of a court of equity. It may be, and for the purposes of this argument it will be assumed, that the

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complainants have a right, in law and in consistency with their charter, to use their bridge for the purposes of a railroad. But if by so doing the great purpose of their charter, the use of their bridge for the purposes of ordinary travel, is seriously impaired—if travelling by ordinary vehicles is rendered inconvenient, insecure, and dangerous—if the convenience and benefit of the public, for whose advantage the franchise was granted, are sacrificed to the pecuniary interests of the corporation, the complainants do not stand in a position to ask the interposition of the extraordinary powers of a court of equity for their relief. The granting of an injunction always rests in the sound discretion of the court, and when upon the answer, which for the purposes of this case must be taken as true, it appears that the great purpose of the grant, the convenience of the ordinary purposes of travel, is seriously impaired, the court will deny the injunction, and leave the complainants to their remedy at law.

The injunction is denied with costs.

In concluding this opinion, I cannot forbear the expression of my regret that more time has not been afforded for the investigation of the important questions arising in this cause than has been permitted by the short time which has elapsed since the argument, and by the incessant interruptions to which I have been exposed by the calls of official duty. I would gladly have held the case for further investigation, but justice to the parties demands that the decision should be promptly rendered.

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A decree *pro confesso*, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree.

And when the order for time is made without notice, though it be made to appear affirmatively that the order was signed and filed prior to the signing of the decree, the complainant will be entitled to the costs of proceeding until he is served with a copy or with notice of the order.

A defendant coming in, without unnecessary delay, by motion or petition, after a decree *pro confesso* regularly taken, will, upon any reasonable ground of indulgence, be permitted to answer upon payment of costs.

But if it appear, upon an examination of the answer, that it contains no valid ground of defence the decree will not be opened.

J. M. Scovel, for defendant, in support of motion.

P. L. Voorhees, for complainant.

THE CHANCELLOR. An ordinary foreclosure bill was filed by the complainant in this cause on the 21st of March, 1860. A subpoena was issued returnable on the 2d of April. The defendants being nonresidents, the usual order for publication was made requiring the defendants to appear and plead, answer or demur, to the complainant's bill, on or before the fourth day of June. On the 5th of June, no plea, answer, or demurrer having been filed, and due proof of publication having been made, the complainant obtained a decree *pro confesso* against all the defendants and an order of reference to a master. On the same 5th of June, Downing, one of the defendants, having filed an appearance, obtained an order for thirty days' time to answer. The motion was made without notice to the adverse counsel, and was unsupported by affidavits, but was granted as a motion of course upon the statement of counsel. An answer was filed by Downing within the time thus allowed. The complainant, having no notice of the order for time to

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answer, proceeded under his decree and order of reference, and on the 17th of June the master's report was filed, and a final decree in favor of the complainant signed. It does not appear whether the decree *pro confesso* or the order for time to answer was first signed.

The defendant now asks—

1. That the decree *pro confesso*, and all the subsequent proceedings under it, be set aside and made void as irregular. And failing that motion, he asks—

2. That the decree be opened, and the defendant be permitted to defend under the answer filed in the cause.

The application is by motion upon notice sustained by affidavits.

1. The decree *pro confesso* is clearly regular. The time for answering expired on the fourth of June. The complainant was entitled to his decree at the earliest moment on the fifth. Until the contrary is shown, the presumption is that the decree was regularly signed. The defendant is asking to avoid it, and it is incumbent on him to show, if the fact be so, that the decree was signed after the order was obtained for time to answer.

2. The second reason relied on, if properly sustained, affords adequate grounds of relief, *viz.* that the defendant has a good defence, of which he has been deprived by mistake or misapprehension on his own part or on the part of his counsel. There is nothing in the objection, that the application can only be made by bill of review or by petition. The decree has not been registered. There is in fact no ground of review or of rehearing. There is no alleged error in the decree as it stands. There has been no hearing. The bill was taken as confessed. The defendant simply seeks an opportunity of presenting a defence, which he has had no opportunity to make. By the practice of the court, the application may be either by petition properly verified or upon motion sustained by affidavit. The former mode is the more usual and formal, but either may be resorted to.

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Where relief is granted upon this ground, it must be upon payment of costs, even though, under circumstances like the present, the order for time had been actually granted before the signing of the decree.

The motion for an order for time is strictly a special motion, and regularly should be heard only upon notice, and be sustained by affidavits or other proof. In practice however, as a matter of convenience, they are constantly granted without notice, and upon the mere allegation of counsel. The order in the present instance was so granted. No notice of the application was given, no proof was made, other than the mere allegation of counsel, that there was a defence, and that his engagements in another court had deprived him of the opportunity of preparing an answer. Such motions can only be regarded as motions of course, and must be considered as granted at the peril of the applicant. If without notice of such order the complainant proceeds with his cause he is regular in so doing, and though the proceeding be afterwards set aside he is entitled to his costs. In this cause, the complainant may be presumed to have been advised that no answer had been filed and no order made for an extension of time before the time for answering had expired. He was entitled, therefore, to his decree. His proceedings were strictly regular. If the defendant designed to arrest his proceeding, he was bound to serve him with a copy of the order for time. It would be manifestly inequitable to subject a complainant to the cost of a proceeding strictly regular, and adopted without notice of his adversary's order. Even though the order for time was signed before the decree, the party was entitled to the cost of his proceeding until duly advised of the order for time. 3 *Daniel's Ch. Pr.* 1789.

The defendant, coming in after a decree *pro confesso* regularly taken upon any reasonable ground of indulgence without unnecessary delay, will be permitted to answer upon payment of costs, though the court may require to

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see the answer or to be informed of the nature of the defence. 1 *Daniel's Ch. Pr.* 576.

In the present case, the answer is on file. On examination, it is apparent that it contains no valid ground of defence whatever. If the truth of every fact alleged in the answer is admitted or established by evidence, it would constitute no defence to the complainant's right of recovery.

The motion must be denied.

WILLIAM KLAPWORTH and DORIS his wife *vs.* MARCUS
DRESSLER and HERMAN ISE.

Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage debt.

This obligation of the purchaser to pay the debt enures in equity to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency in a bill to foreclose.

This case came up on final hearing upon the pleadings and a report of a master.

Keasby, for complainants.

Runyon, for defendants.

THE CHANCELLOR. It appears, by the master's report, that the mortgage in question was given by the defendant, Dressler, on the 11th of August, 1853, for the whole purchase money of the mortgage premises at that time conveyed to him by the complainants. On the 1st of August, 1854, Dressler conveyed the premises to Ise, the other defendant, by a deed of bargain and sale, stating therein that the premises are sold "subject to a mortgage for three hundred dollars, which Herman Ise does hereby

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agree and assume to pay, and it is so understood by the parties to these presents." The master further reports that, in his opinion, the said Herman Ise should be decreed to pay the deficiency (if any), with interest and costs, after applying to the payment of the debt the proceeds of the sale of the mortgaged premises, and to be personally liable to the complainant therefor.

1. Is Ise, the purchaser, liable to the complainant for the deficiency?

2. Can the liability be enforced in this form of proceeding?

The premises are not merely conveyed to the plaintiff subject to the mortgage debt. When this is done the grantee takes the premises subject to the encumbrance, but incurs no personal responsibility. But the grant is here made upon the specific condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title, the clause becomes his covenant, and he thereby becomes bound to the grantor to pay the mortgage debt, and liable to him for any deficiency which may exist upon a sale of the mortgaged premises. *Finley v. Simpson*, 2 Zab. 311, and cases there cited.

Does this liability enure in equity to the complainants, and may it be enforced for their benefit? If the complainants, after a sale of the mortgaged premises, should enforce payment of the balance by an action at law against Dressler upon his bond, it is clear that he would have his remedy over against Ise. May the complainants have their remedy in equity directly against Ise when Dressler is insolvent, or no remedy can be had against him personally?

Where a grantee in a deed covenants with the grantor to pay off an encumbrance subsisting upon the premises, if the grantor is personally liable for the payment of the encumbrance, the grantee, by virtue of the agreement, is regarded in equity as the principal debtor, and the grantor as a surety only. And it is also a principle in equity,

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that "a creditor is entitled to the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment." *Curtis v. Tyler*, 9 Paige 432; *Halsey v. Reed*, 9 Paige 446; *King v. Whitley*, 10 Paige 465; *Blyer v. Monholland*, 2 Sand. Ch. R. 478; *Rawson's adm'r v. Copland*, 2 Sand. Ch. R. 251; *Trotter v. Hughes*, 2 Kernan 74.

These cases fully establish the principles above stated, and recognise their application to a case like that now before the court. The case of *Blyer v. Monholland* is directly in point. Adopting and applying these principles, they control the present case.

Dressler is legally liable to the complainant for the payment of the complainant's mortgage. Ise has covenanted with Dressler to pay the debt, and is eventually liable. It is a part of the price which he was to pay for the premises. Whether the covenant bound him to pay the debt to Dressler, or directly to the complainants, is in equity immaterial. The effect of this arrangement made Dressler in equity the surety of Ise in respect of the mortgage debt to the complainants. The obligation enured in equity to their benefit. This result is perfectly equitable and just, as between all the parties. The debt is justly due and owing to the complainants. Ise is, by the terms of his deed, bound to pay it. It is a part of the price of the land to which he holds the title. Dressler is not in equity liable for the debt. He has no interest in the land. He parted with his interest to Ise, and as a part of the price, received his covenant to pay this debt. In equity the debt is the debt of Ise, and Dressler the mere security. If Dressler should be compelled to pay, he would have recourse over immediately to Ise. If, therefore, Dressler were able and willing to pay the debt, the decree against Ise is in accordance with equity. But the bill charges, and the master

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reports, that Dressler is insolvent, and if this relief is denied the complainants the result will be that the complainants, lose their debt, and Ise acquires title to the land without paying the price which he covenanted to pay. I cannot doubt that a decree against Ise, as prayed for in the bill of complaint, is in strict accordance with the principles of equity.

It remains to be considered whether the complainants are entitled to such relief upon a bill to foreclose.

In New York, on a bill filed for the satisfaction of a mortgage, it is the practice to decree payment by the mortgagor, or by any other person who may have become security for the payment of the debt, of the balance of the debt remaining unsatisfied after a sale of the mortgaged premises. This is done, however, by virtue of the express provisions of their statute. 2 *Rev. St.* 191, § 152, 154, (1829).

Independent of statutory provision, the rule of equity is, that a bill to foreclose is in the nature of a proceeding *in rem*, and the party is confined in his remedy to the pledge. The suit is not intended to act *in personam*. *Dunkley v. Van Buren*, 3 *Johns. Ch.* 331.

In this case the bill was filed to foreclose a mortgage given to secure the payment of a bond. The bill, in form, was an ordinary foreclosure bill. The complainant applied for a decree directing the mortgagor, in case of a deficiency upon the sale of the mortgaged premises, to pay the remainder of the debt. It was ruled that his proper remedy was at law upon the bond. *Hunt v. Dunn*, 6 *Stew. & Por.* 138.

But if the bond be lost, or if there be other special circumstances which, independently of the mortgage, give the court jurisdiction over the demand, a decree against the mortgagor will be made for the balance of the debt remaining unsatisfied by a sale under the mortgage. *Green v. Crocket*, 2 *Dev. & Bat. Ch.* 390; *Crutchfield v. Coke*, 6 *J. Marsh.* 89.

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In this case the complainant has no remedy whatever at law against Ise. The claim is purely equitable, and must be enforced, if at all, in a court of equity. The bill is framed with a view to this form of remedy, and prays for this specific relief. It charges that Ise is responsible for the debt. He has had a full opportunity of answering. Under these circumstances, there is no reason why he should not be decreed to pay the debt under the bill.

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A bond valid in its inception is not rendered invalid by the subsequent receipt of usurious interest.

If after the completion of the contract, a part of the loan is withheld as a premium for the loan, in violation of the agreement, the contract is not thereby rendered usurious.

Where a party comes into a court of equity seeking relief against a usurious contract, he must offer to pay the sum actually due.

Bill for discovery, relief, and injunction to restrain proceedings at law.

The bill charges, that on a loan of \$500, made by the defendant's intestate to the complainant, on the 26th of March, 1849, the complainant gave his bond, of that date, in the penal sum of \$1000, conditioned to pay \$500, with legal interest, on the 26th of July, 1849; that out of the \$500 thus loaned, the intestate retained \$25, as a bonus for the loan for four months, over and above the legal rate of interest, and that at the end of every four months during the period of nine years, he demanded and received an additional bonus of \$25 over and above the legal rate of interest for the continuance of the loan—and that during that period the complainant paid \$75 per annum, amounting to \$675 over and above the legal rate of interest, as a consideration for the loan; that on the 8th of November, 1849, the obligee died intestate, and the complainant having refused to make further payments upon

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the bond, the administrator brought suit at law, and on the 16th of May, 1860, recovered judgment, and sued out execution for the principal and interest remaining unpaid, by virtue whereof the sheriff has levied upon and is about to sell the property of the complainant. The bill suggests surprise as a reason for not making defence at law, prays a discovery of the amount already paid, and an account, that the bond may be declared void, that the administrator may be required to refund the amount illegally paid, and that an injunction may issue to restrain further proceedings at law.

S. A. Allen, for the complainant.

THE CHANCELLOR. 1. Upon the case made by the bill, the bond itself was not in its inception usurious. Upon its face it is made for a legal rate of interest. There is no charge that it was made upon a corrupt agreement. The mere fact that a part of the loan was withheld as a bonus for the loan, in the absence of any charge of an agreement for that purpose, does not constitute usury. *Howell v. Auten*, 1 *Green's Ch.* 44.

Nor does the taking of usurious interest upon the bond after its consummation render the bond invalid. *Sloan v. Towers*, 2 *Green* 510; *Ex parte Jennings*, 1 *Mad.* 183, (*Am. ed.*); *Comyn on Usury* 187.

The judgment and execution, it is admitted, only seek to enforce the payment of the principal of the bond with the legal rate of interest.

2. The bill contains no offer to pay the sum actually due, or that may be found due upon the bond. The rule is well settled, that where a party comes into a court of equity seeking relief against a usurious contract he must offer to pay the sum actually due. If he omit to make such offer the bill is demurrable, and an injunction will not be allowed. *Miller v. Ford*, 1 *Saxton* 358; *Fanning v. Dunham*, 5 *Johns. Ch. R.* 122; *Morgan v. Selmerhorn*, 1 *Paige* 544.

The order for injunction is denied.

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**CHARLES G. ALLEN vs. THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF MONMOUTH.**

In cases of public nuisance, a bill in equity asking relief by way of prevention, can be maintained by a private person only on the ground of apprehended special damage peculiar to himself, and distinct from that done to the public at large.

A statute of this state authorized the freeholders of the county of Monmouth to erect a bridge over the Navesink river, "beginning at or near the house of Samuel Hubbard, esq., commonly called Smock's point, or near the house of Joseph Van Schoick, or from Joseph Smith's point to the opposite shore." On 3d January, 1826, the freeholders selected the site for the bridge, and upon which it was accordingly erected. A railroad had been recently constructed intersecting the road near the bridge at the south side of the river, rendering the use of the road at that terminus dangerous. To avoid this inconvenience, it was now proposed, in erecting a new bridge, to locate its southern terminus at a point about one hundred yards west of its original site. The complainant was the owner of about twenty-five acres of land, near the termination of the existing bridge, bounding on the public road leading from the bridge, of a valuable wharf upon the river, a boarding house, and other valuable improvements, situate upon streets connected with the road leading to the bridge, to all of which it afforded the most convenient access.

Held—1st. That the right to erect bridges over navigable rivers does not reside in the chosen freeholders by virtue of their general powers, but must be derived from special power conferred by the legislature.

2d. That by the above act, the power of locating the bridge within certain limits was given to the discretion of the freeholders; but that having exercised that discretion, and the selection having been made, their power was exhausted.

3d. That in this case the freeholders had not the power materially to alter either terminus of the bridge.

4th. That the injury sustained by the complainant was in no sense peculiar to himself, and on this account his bill could not be sustained.

5th. That although the new bridge was technically a nuisance, yet as it was being built in good faith and for the public benefit, a court of equity would not restrain its erection, even on an information by the attorney general in behalf of the public.

An injunction had been allowed on filing the bill, and a motion was now made to dissolve it.

J. Parker and Vroom, for motion.

Allen and Dayton, for defendants.

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THE CHANCELLOR. The complainant, by his bill, asks an injunction to restrain the defendants from changing the location of a bridge across the north branch of Navesink river, in the county of Monmouth. The intervention of this court is asked upon the ground that the defendants have no power or authority to change the location of the existing bridge, and that the change of location will be a peculiar and irreparable injury to the property of the complainant.

The bridge was originally located and constructed by the board of chosen freeholders of the county of Monmouth, under the authority of an act passed on the third of December, 1825. The act authorizes the bridge to be erected, "beginning at or near the house of Samuel Hubbard, esq., commonly called Smock's point, or near the house of Joseph Van Schoick, or from Joseph Smith's point to the opposite shore." (*Pamph.* 54.) On the 3d of January, 1826, the freeholders, under authority of the act, selected the site for the bridge, and ordered that it should be located "at Oyster-shell point, over said river, to the opposite shore, near Josiah Van Schoick's." The bridge was erected upon the site thus determined upon, and having become dilapidated, in the year 1839, a new bridge was erected about six feet east of the old bridge, but substantially upon the same site and within the limits of the public highways upon both sides of the river. It is now proposed to erect a new bridge, commencing at the same point, near Van Schoick's house on the north, or Middletown shore of the river, but extending to the opposite, or Shrewsbury shore, about one hundred yards west of the site as originally located. On the Shrewsbury shore the bridge, as proposed to be located, does not connect with the ancient and existing highway, but with a new road laid out, or proposed to be laid out, though not yet lawfully authorized, to connect with the ancient highway some distance from the termination of the bridge.

Have the freeholders power to make the proposed

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change in the location of the bridge? By the general laws of the state, the erection and maintenance of county bridges is committed to the discretion of the chosen freeholders of the respective counties. It is their province to decide upon the necessity or expediency of erecting a bridge, to fix the location, and determine the mode of construction. With this discretion the courts have no power to interfere. But this authority does not extend to the erection of bridges across navigable rivers. The channels of public rivers cannot be obstructed, nor their free navigation impeded, except by authority of the legislature. Hence the existing bridge across the Navesink was erected, as all bridges over navigable rivers in this state must be, by express legislative sanction. The right to erect the bridge or to determine the site does not reside in the board by virtue of their general powers, but is derived from the power conferred by the legislature.

The legislature, by the act in question, gave authority to the board to erect the bridge at one of three designated points, and thence across the river to the opposite shore. Within those limits the power of location was given to the freeholders. But that discretion having been exercised, and the selection having been made, the power was exhausted. It is not a continuing power, which enables the freeholders in all future time to change the location at pleasure. The general principle of the law is, that when the power of election has been once exercised when the election is made the power is determined.

A railroad or company, having once located their route under the authority of their charter, cannot alter the location. *Morhead v. The Little Miami R. R. Co.*, 17 *Ohio R.* 340; *Little Miami R. R. Co. v. Naylor*, 2 *Ohio R.* 235 *Pearce on Railroads, &c.*, 218.

Nor can a canal company change the dimensions of their canal after it has been constructed, though the proposed change is within the power originally conferred upon the corporation by their charter. *Blakemore v. The Glamorganshire Canal Navigation*, 1 *Mylne & K.* 154.

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Nor can a turnpike company change the location of their gates which have once been located by the corporation under authority of law. *State v. Norwalk and Danbury Turn. Co.*, 10 Conn. R. 157; *Turnpike Co. v. Hosmer*, 12 Com. 364; 2 Swan 282; 18 Johns. R. 397.

So when an unlimited discretion as to the location of a bridge is vested in a bridge company, when that discretion is exercised and the bridge built the grant is located, and the power of location is executed and gone. *Cayuga Bridge Co. v. Magee*, 6 Wend. 85.

The principle, as applied to private corporations, is not denied or questioned. No reason is perceived why the same principle should not apply where a special power is conferred, and an election given to a board of chosen freeholders to erect a bridge over navigable waters. In such cases the discretionary powers of the board may be exercised in regard to all matters to which they appertain, as in the case of all other bridges they may decide whether the bridge shall or shall not be erected, what shall be the character and cost of the structure, and whether it shall be continued or abandoned. All these are matters of discretion, vested in the board by virtue of their office, and in no wise dependant upon the special grant of power to erect the bridge. Thus in *Tucker v. The Freeholders of Burlington* (Saxton 282), it was held that an act which authorized the freeholders, at their discretion, to build and maintain a bridge over Bass river, at a specified point, vested in the freeholders a right to build the bridge at the point specified, whenever, in their discretion, the right might be advantageously exercised.

The power of building the bridge was conferred, and the location designated by the act. The time of building was left to the discretion of the freeholders, and might be exercised by them at their pleasure. No election as to the exercise of the special powers conferred was given by the act. But when a special power is conferred upon the freeholders of building a bridge over navigable water,

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and of locating it at one of two or more points, the election is not made by virtue of the general discretionary power of the board, but by virtue of the special power conferred by the act. It is not a continuing power, but when once exercised it is gone for ever. The freeholders having, in pursuance of the power conferred by the act, located and built "the bridge at Oyster-shell point, over said river, to the opposite shore, near Josiah Van Schoick's," have no power to change the location or materially to alter either terminus of the bridge. The case is not altered by the fact stated upon the argument, that Oyster-shell point includes a large extent of shore, including the point at which the new bridge is to have its termination, so that the location of the new bridge is not in conflict with the election originally made. What the board meant by their election is best ascertained by their action. The maps exhibited in the cause show that the bridge on the Shrewsbury side of the river terminates at a point of land in the bend of the river. The building of the bridge at that point shows that the freeholders, by the location at Oyster-shell point, intended the point at which the bridge is built, and not an indefinite extent of shore. This construction of the power conferred in the location of bridges is imperatively demanded on considerations of public policy. In authorizing the construction of a bridge over navigable waters, the legislature may wisely leave to the discretion of the freeholders the designation of the precise point at which the bridge shall be located. But when the election has been made, and the bridge erected, and when, in the progress of time, roads are opened, buildings erected, and valuable improvements made, adapted to and induced by such location, the consequences of a change of location may be such as the legislature never could have contemplated and never designed to authorize. A change of circumstances has rendered a change of location, which was a matter of indifference when the law was passed, highly prejudicial alike to private and to public interests.

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A power of election, which in the one case the legislature might be willing to confer, in the other they would feel constrained to deny. The public grant of power in this case, as in all others, must be strictly construed. It conferred upon the freeholders the power of election, and the right having been exercised, the power is exhausted. I am of opinion that the freeholders have no rightful power, under the special authority conferred upon them by the legislature, to change the location of the bridge in question.

The defendants further claim that, if the special power conferred by the statute is exhausted, they may lawfully change the location of the bridge, by virtue of their general powers, on the ground that the river has ceased to be navigable. The river has always been regarded as navigable. Bridges at and above this point have always been erected by legislative authority. The facts alleged and proved by the defendants, though they seem to show that the navigation above Red bank is of little comparative value, do not prove that the stream is not navigable, and that it is consequently withdrawn from the guardian power of the legislature. The freeholders themselves have not so regarded it.

But this case must be decided upon other grounds. I have expressed an opinion upon this point because it was elaborately argued by counsel, and because it was intimated that it was desired for the satisfaction of the freeholders that the views of the court upon the question of power should be known.

The change of the location of the bridge is unlawful, as being an unauthorized obstruction in the channel of a navigable river. Obstructions to navigation are public nuisances. They are to be remedied at common law, by indictment, or in equity, by an information filed by the attorney general. *Angell on Tide waters* 115, 117; *The Attorney General v. Stevens, Saxton* 369; *The Attorney Gene-*

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ral v. The New Jersey R. R. and Trans. Co., 2 *Green's Ch. R.* 136; *Newark Plank Road Co. v. Elmer*, 1 *Stockt.* 754.

In cases of public nuisance a bill in equity, asking relief by way of prevention, can be maintained by a private person only upon the ground of apprehended special (and peculiar) injury to himself, distinct from that done to the public at large. *Angell on Tide waters* 121; *Crowder v. Trickler*, 19 *Vesey* 616; *Corning v. Louverre*, 6 *Johns. Ch.* 439; *City of Georgetown v. Alexandria Canal Co.*, 12 *Peters* 91; *Bigelow v. The Hartford Bridge Co.*, 14 *Conn. R.* 565.

The complainant, by his bill, represents that he is the owner of twenty-five acres of land in the village of Red bank, near the termination of the existing bridge, bounded on one side by the river and partly by the public road leading from the bridge through the village. That he owns a valuable wharf upon the river, a large boarding house and other valuable buildings and improvements in the village, situate upon streets connected with the road leading to the bridge, to all of which it affords the most ready and convenient access. He claims relief on the ground of special injury to his rights as a citizen, in the navigation of the river, as the owner of the real estate, in the depreciation of its value, and as a taxpayer, by being compelled to pay an increased amount of tax for the cost of a work proposed to be erected without lawful authority.

As regards the rights of navigation, it is manifest that the complainant sustains no injury by the erection of the new bridge not common to every citizen.

The complainant owns no wharf or other property above the bridge. His wharf, his land, and all his improvements lie below the existing bridge. If it was proposed to erect the new bridge further down the river, so as to prevent all access to his wharf, there would be at least a semblance of reality in his claim of special injury. But the new bridge is proposed to be located further up the stream, leaving the present bridge between it and the defendant's property.

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It is not perceived, therefore, how the complainant can sustain any special or peculiar injury from the obstruction of navigation.

The complainant's land does not lie adjacent to the present bridge, nor within 100 feet of its termination. He owns no land, as appears by the defendant's answer and the accompanying map, between the termination of the present bridge and the point where the new road to the proposed bridge will intersect the ancient highway. All the injury which can result to his property from the erection of the proposed bridge will be by rendering the approach to a part of his property somewhat less direct, and by diverting a portion of the travel from passing his land, thus rendering it less public. But these constitute no grounds of legal injury or equitable relief.

The injury which the complainant suffers as a taxpayer he sustains in common with every other taxpayer of the county, and in this respect the damage which he sustains is in no sense special or peculiar: and if it were, a court of equity would not exert its restraining power to arrest a great public improvement on the alleged ground that a dollar would thereby be added illegally to the amount of the complainant's tax.

The injunction must be dissolved, and the complainant's bill dismissed with costs.

To guard against misapprehension, it is proper to add that, aside from the form of proceeding, there is nothing in the case, as it appears upon the defendant's answer, to warrant the interference of this court, even upon an information. A court of equity exercises its restraining power in cases of public nuisance with great caution.

In the case of *The Attorney General v. The New Jersey Railroad and Transportation Co.*, Chancellor Vroom denied the relief in a case somewhat similar to, but much stronger than the present. The river above the bridge is comparatively little used for the purposes of navigation or float-

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age. No masted vessels pass it. For several years the draw in the existing bridge has been removed or disused. The railroad bridge, recently erected further down the river, is without a draw. The erection of the new bridge will create no serious impediment to navigation.

A change of location of the bridge from the present site has become highly expedient, if not absolutely necessary. The Raritan and Delaware Bay Railroad intersects the highway near the termination of the old bridge at a very acute angle, and runs for some distance within the limits of the road, rendering the use of the highway inconvenient and dangerous. A due regard to the safety of the lives and property of the travelling public requires the removal of the bridge and highway to a position more remote from the railroad. The action of the board, in making the change, appears to have been adopted in good faith, upon due deliberation in accordance with public sentiment, and upon the petition of large numbers of the inhabitants of the county residing in the vicinity. Under such circumstances there is no reasonable pretext for interfering with the action of the freeholders, although the work that they propose to construct may technically constitute a public nuisance. Whether the public exigency is such as to require the immediate action of the board without securing the concurrence of the legislature, is a question solely for the consideration of the freeholders, the legally constituted guardians of the public interests of the county.

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**SETH W. MAGIE vs. THE GERMAN EVANGELICAL DUTCH
CHURCH OF NEWARK and others.**

The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charters, cannot purchase and hold real estate under trusts of their own creation which shall protect their property from the reach of their creditors.

Where property is given to a corporation in trust for a charitable use the trust is the creature of the donor, and he may impose upon it such character, conditions, and qualifications as he may see fit.

But the case is widely different where a corporation attempts, by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors.

The premises in question, and upon which the defendants had erected a house of worship, were conveyed to them for the consideration of one thousand dollars. The deed was an absolute conveyance in fee upon certain trusts that the property should be held as a Lutheran church for ever, &c., and contained a clause that the grantee should not by deed alienate, dispose of, or otherwise charge or encumber said property, &c. The corporation executed a mortgage to secure a legitimate debt.

Held, that the corporation had the legal title to the land, and the power at law of executing the mortgage, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use.

The case was argued on bill, answer, and the admissions of the counsel. The facts on which the case was decided appear in the opinion of the court.

T. Runyon, for complainant.

J. P. Bradley, for defendants.

THE CHANCELLOR. The only question submitted for the consideration of the court is the power of the corporation to encumber the premises by mortgage. For the purpose of the present inquiry, the existence and *bona fides* of the debt and the due and formal execution of the mortgage by authority of the corporation is conceded. The defendants, being an organized religious society or congregation,

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were incorporated under the act to incorporate trustees of religious societies. *Nix. Dig.* 686.

The mortgaged premises were conveyed to them by Samuel H. Conger and wife, by deed dated the 31st of October, 1839, for the consideration of one thousand dollars, upon which the defendants have erected a house of worship. The deed is an absolute conveyance in fee upon the following trust, *viz.* "to have and to hold the said property as an Evangelical Lutheran church for ever, in which the doctrine of the Augsburg confession and Luther's smaller catechism shall be taught and adhered to; and provided that, if necessary, the privilege of preaching in the English language, besides the German, shall be granted to the rising generation, until such a time that a separate church can be provided for an English congregation, so, however, that the Germans shall always have the right to select their time for worship; and provided further, that the said party of the second part shall not, by deed, mortgage, or by any other ways or means, alienate, dispose of, or otherwise charge or encumber said property, excepting the mortgage now given to Samuel H. Conger to secure part of the purchase money of said premises. And provided further, that in case these conditions be violated, then any one or more regular members shall have the right of applying to the Evangelical Lutheran Ministerium of the state of New York and adjacent parts, with which the congregation is connected, to take possession of, hold, and keep said property in trust for carrying out the above named purposes: and in case said conditions be violated, and no appeal made to the said Evangelical Lutheran Ministerium of the state of New York and adjacent parts, then the officers of said ministerium shall constitute a board of trustees, with full powers to secure said property for the above named purposes."

No evidence has been taken in the cause. These facts and the terms of the trust have been derived from the

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admissions of counsel upon the argument, and from the allegations of a bill filed by the defendants against Moschamp, (2 *Stockton*), which is used by consent as evidence for the purposes of the present investigation.

Independent of the character of a trust impressed upon the property by the terms of the conveyance, the condition annexed to the grant, that the property shall be inalienable, is clearly void.

An unlimited power of alienation is an inseparable incident of an estate in fee simple, and cannot be restrained by any provision or condition whatever. 1 *Cruise's Dig.*, Tit. 1, § 53; 4 *Cruise's Dig.*, Tit. 32, c. 23, § 1, 2; *Co Litt.* 206, c. 223 a; *Litt.* § 860.

A condition repugnant to the nature of the estate to which it is annexed, as that a tenant in fee shall not alien, is void in its creation. 2 *Cruise's Dig.*, Tit. 13, c. 1, § 19, 32.

But it is urged that the principle is not applicable to the conveyance now under consideration, inasmuch as the property is conveyed by the grantor to a religious corporation for a charitable use upon this special trust, among others, that it shall be held "as an Evangelical Lutheran church for ever," and shall not be alienated, disposed of, charged or encumbered, by deed, mortgage, or by any other ways or means.

The trust was not created by *gift* or *devise*. The land was purchased by the corporation for a valuable consideration, and the church has been erected, it must be presumed, by the funds of the corporation. The trust therefore, in the deed, it is fair to assume was inserted by the defendants at their own instance and for their own benefit and protection.

Nor is the trust created or protected, or the alleged inability to convey imposed by the charter of the defendants as a body corporate. On the contrary, by their act of incorporation, the defendants are authorized not only to purchase and hold lands for the use of the congregation,

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but "the same, or any part thereof, to sell, grant, assign, demise, alien, and dispose of."

The inquiry, then, results in this—may the trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their act of incorporation, purchase and hold real estate under trust of their own creation which shall protect their property from the reach of their creditors, and shield it against appropriation for the payment of their just debts? Is that a charitable use which a court of equity is bound to protect? Where property is given to a corporation in trust for a charitable use, the trust is the creature of the donor. He may impose upon it such character, conditions, and qualifications as he may see fit. The property being a gift, no wrong is thereby done to the creditors of the corporation, and a court of equity may well protect and enforce all the conditions of the gift. But the case is widely different where a corporation attempts by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors. This certainly is not a charitable use which a court of equity can be called upon to protect and enforce.

So far as this deed, by means of the trusts contained in it, dedicates the property to the exclusive enjoyment of the religious society for whose use it was designed, and limits and regulates the terms of that enjoyment, the trusts will be protected and enforced by the court. The incorporators had a clear right to specify the purpose to which the property should be dedicated and the use to which it should be appropriated. But the attempt to restrain the powers of alienation for the necessary uses of the corporation is illegal, and the condition imposing such restraint is inoperative and void.

The corporation had the legal title to the land and the power at law of executing the mortgage. There is no equity in refusing to enforce the mortgage for the payment of the honest debts of the corporation under color of protecting a charitable use.

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THE PROPRIETORS OF THE BRIDGES OVER THE RIVERS PASSAIC AND HACKENSACK vs. THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

The clause in the charter of the Proprietors of the Bridges over the rivers Passaic and Hackensack, which declares that it shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river, constitutes a contract on the part of the state, which cannot constitutionally be annulled or abrogated.

It is immaterial whether the instrument by which the public faith is pledged is in its terms a contract, or in form a mere legislative enactment: in either event it is equally a contract within the meaning of the constitution.

The Proprietors of the Bridges over the rivers Passaic and Hackensack have, by contract with the state, the exclusive franchise of maintaining said bridges, and taking tolls thereon, and such contract is within the protection of the constitution, which declares that no law shall be passed impairing the obligation of contracts.

But the construction of a viaduct over said river for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not a *bridge* within the prohibition of said charter.

Public grants are to be construed strictly.

This case was argued upon bill and answer on motion for an injunction.

Zabriskie and Attorney General, for complainants.

Gilchrist and Bradley, for defendants.

THE CHANCELLOR. By an act of the legislature, approved on the 8th of March, 1860, the Hoboken Land and Improvement Company were authorized to lay out and construct a railroad from Hoboken to Newark, with power to erect and maintain the necessary viaducts over the Hackensack and Passaic rivers. Claiming to act in pursuance of the authority thus conferred, the defendants have commenced the construction of a bridge, or viaduct, for the purpose of carrying their railway across the Hack-

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ensack. The Proprietors of the Bridges over the rivers Passaic and Hackensack, a company incorporated by the laws of this state, have filed their bill against the Hoboken Land and Improvement Company, praying that the defendants may be restrained by injunction from erecting the said bridge, or any other bridge, across the said river, between its mouth and the place where Kingsland creek empties into the same.

The complainants claim, under legislative grant, the exclusive right of maintaining a bridge across the Hackensack within the limits above specified. The defendants deny the existence of such exclusive right. They also deny, if the complainants have such right, that the bridge which they are constructing, and which is sought to be enjoined, is a violation of that right.

The material issues made by the bill and answer are—

I. Whether the complainants have, by virtue of a contract with the state, the exclusive franchise of maintaining a bridge across the Hackensack river, between its mouth and the place where Kingsland creek empties into the same, and of taking tolls thereon.

II. Whether the structure which the defendants are engaged in erecting is a violation of the complainants' franchise.

The exclusive right claimed by the complainants, though exercised for more than sixty years—though frequently the subject of legal investigation and legislative consideration—is now, for the first time, made the subject of direct judicial decision. Familiar, therefore, as the subject may be to the profession and to the public, it is proper that the grounds of the claim, and the numerous objections urged against its validity, should be considered, and, as far as may be by this court, settled.

The highway between Newark and New York, as is well known, is intersected by the Passaic and Hackensack rivers. The importance of the route, and the serious obstacles to its convenient use by the public, early

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attracted the attention of the legislature. As early as the 20th of June, 1765, an act was passed for laying out a road from Newark to the public road leading from Bergen-point to Powles-hook, and for erecting and establishing ferries across the rivers Passaic and Hackensack. *Allinson's Laws* 276. Under the provisions of this act, the line of travel was opened and the ferries established.

On the 24th of November, 1790, the legislature, by an act entitled "An act for building bridges over the rivers Passaic and Hackensack, and for other purposes therein mentioned," appointed five commissioners, with special powers to carry into effect the purposes of the act. *Pamph. Laws* 685, chap. 333. The commissioners were authorized, in execution of the trust reposed in them, to select convenient and suitable sites, within certain prescribed limits, for the erection of bridges over the said rivers, and to erect, or cause to be erected at those sites, bridges of the description specified in the act. They were also authorized to lay out, in connection with the said bridges, a road four rods wide from the court-house in Newark to Powles-hook. The bridges so to be erected were declared to be toll bridges. The commissioners were authorized, "at their discretion, to let the said bridges to any person or persons, to be erected and made and kept in good repair by the tolls arising therefrom;" and the said commissioners, or the persons farming or having the care of said bridges, were authorized to demand and receive such rates of toll as the commissioners should appoint and direct to be paid.

In order the better to carry into execution the ends proposed by the act, the commissioners were further authorized, at their discretion, to contract and agree, with any person or persons who would undertake the same for such toll, and for so many years, and *upon such conditions*, as in their discretion should seem expedient.

It was further enacted, that the bridges to be built by virtue of the act should continue the property of the per-

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sons therein mentioned, their executors, administrators, or assigns, for the term of ninety-nine years from the time of passing the act.

By the 15th section of the act (upon which the complainants' claim of an exclusive franchise is founded), it is enacted as follows: "It shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river Passaic, at any place or places between the mouth of the said Passaic river and the place where the brook, commonly called Second river (on which stand the mills of Cortlandt and Bennet), now empties itself into the said river Passaic; nor shall it be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river Hackensack, at any place or places between the mouth of the said Hackensack river and the place where Kingsland creek empties and discharges its waters into the said river Hackensack."

The act contains various other provisions relating to the rights, duties, and property of the grantees of the franchise.

On the 19th of February, 1793, the commissioners, in pursuance of the powers conferred by the act of 1790, entered into a contract in the form of a lease by deed, indented, made, and executed by and between the commissioners, of the one part, and Samuel Ogden and thirty-six others, his associates, of the second part, for building and maintaining the said bridges. By the contract, the commissioners demised, granted, and to farm let, to the party of the second part, the bridges to be erected over the rivers Passaic and Hackensack, with the right of taking tolls thereon, not exceeding certain specified rates, for the term of ninety-seven years from and after the 24th of November, 1792, being the entire term for which the property and franchise was vested in the commissioners by the statute. In consideration of this grant, the lessees

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covenanted to construct the bridges within the time limited by the act, at the points and in the manner designated by the commissioners to perform the duties enjoined by the act, and, at the expiration of the term, to surrender the bridges and causeways in good repair unto such persons as may be by law authorized to receive the same. On the 5th of November, 1798, the legislature, on the petition of the stockholders, extended the time for the completion of the bridge six months beyond the time originally limited.

By an act of the legislature, passed on the 7th of March, 1797, (*Pamph. Laws* 200) the stockholders of the bridges, under the lease thus made by the commissioners, were incorporated under the name of "the Proprietors of the Bridges over the rivers Passaic and Hackensack."

This brief historical statement presents the origin of the complainants' title to the exclusive franchise claimed by them, of maintaining bridges across the rivers Passaic and Hackensack, and seemed necessary to a full understanding of the nature and foundation of their claim, and of the force of the objection urged against it.

The complainants claim that the 15th section of the act of 1790, by which it is declared that it shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river, &c., is a contract on the part of the state which cannot constitutionally be annulled or abrogated.

To this claim it is objected (1st) that nothing in this act can operate as a contract on the part of the state, inasmuch as there was no party with whom the contract could be made. The act is not a charter of incorporation—it confers no corporate powers. The commissioners named in it are agents of the state exercising a public trust. They were to receive no personal benefit from the act, save a mere compensation for their services. They were to account for the moneys received by them, in like manner as the trustees under the act of 1765, for erecting

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and establishing ferries across the rivers Passaic and Hackensack.

All this is true. The commissioners named in the act did exercise a public trust. They were the agents of the state; they were authorized to receive money by gift and to raise money by lottery, for the purpose of erecting the bridges proposed to be built; but they were also, by the act, invested with the property of the bridges to be built for the term of ninety-nine years and with the franchise of taking tolls. They were authorized to farm out the building of the bridges and the franchise of taking tolls to others who would undertake the work; the rights and privileges of the parties to whom the building and care of the bridges should be farmed out was specified in the act, and the faith of the state was pledged that no other bridge should be erected to the prejudice of the franchise thus granted during the continuance of the grant. The contract thus made by the commissioners, in pursuance of the act, was declared to be valid and binding on the parties contracting as well as on the state of New Jersey, and as effectual as if the same had been particularly and expressly set forth and enacted in the law. It is immaterial whether the instrument by which the public faith is pledged is in its terms a contract, or in form a mere legislative enactment. In either event, it is equally a contract within the meaning of the constitution, and cannot be annulled or violated at the pleasure of the legislature.

It cannot be doubted that the enactment was intended by the legislature as an inducement to capitalists to embark in the enterprise in the hope of eventual remuneration, inspired by the pledge of protection against competition, and that it was so understood and accepted by those who engaged in the undertaking. The pledge must have been intended for the benefit of the parties who might contract with the commissioners to erect and maintain the bridges. It could otherwise have no practical operation whatever.

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That this provision was regarded by the legislature themselves as a contract for the benefit of the parties who should erect the bridge, is apparent from the proviso of the 15th section, by which it is provided, that if the commissioners, or some person under them, should neglect for the space of four years to erect the bridges in pursuance of the act, or when erected to maintain and support them, or either of them, it shall be lawful for the legislature to repeal or alter the act. Nothing can be more explicit. A violation of the undertaking, on the part of the commissioners or their lessees, shall absolve the legislature from all obligation to observe the engagement upon their part.

Again, it is objected that the language of the act imposes no obligation or restriction whatever upon the legislature. It does not declare that the legislature will not authorize another bridge to be erected: it simply declares that it shall not be lawful for any other person to erect another bridge—which is a mere legislative prohibition, acting not upon the legislature but upon the citizen, and which may be repealed by any subsequent legislature. But the obvious answer to this objection is, that upon this construction the act is entirely nugatory and without meaning. The rivers Passaic and Hackensack were then, as they now are, navigable rivers. No bridge could be erected over either of them, except by legislative authority. The act of 1790 conferred authority upon the commissioners and their grantees to build the bridges; and the 15th section was intended as an engagement, upon the part of the legislature, that the authority should be conferred upon no other. The plain meaning of the clause is, that it shall not be *made* lawful for any other person to erect a bridge over either river. The language used, though perhaps somewhat equivocal, is the usual form in which the public faith is pledged. It is in fact the ordinary legislative formula in which exclusive privileges are granted. Instances of a precisely similar character will be found in the supplement to the charter of the Trenton

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Delaware Bridge Company, in 1801, *Pamph. Laws* 58; in the supplement to the charter of the Delaware and Raritan Canal Company, in 1830, *Harr. Comp.* 330; and in an act relating to the Camden and Amboy Railroad Company, in 1831, *Harr. Comp.* 331.

Again, it is objected that the complainants can have no vested rights, except those enumerated or specified in the lease of the commissioners to the farmers of the work, on the 19th of March, 1793, and that this exclusive privilege is not granted or specified in the lease. But the grant of the exclusive right emanated not from the commissioners, but from the legislature. It was conferred, as we have seen by the terms of the act, not only upon the commissioners, but upon those by whom the bridges should be erected. This right, in common with others, is conferred by the act. Duties and burthens are imposed by the act. It required no contract of the commissioners to confer the right or impose the duty. The commissioners might at their discretion, under the authority conferred by the act, have restricted the privileges of their grantees; but in the absence of such limitation, they are entitled to all the privileges and benefits conferred by the act as fully as they were vested in the commissioners.

This was the unanimous opinion of the Supreme Court in the case of *The Bridge Proprietors* ads. *The State*, 1 Zab. 384, confirmed by the Court of Errors in the same case, 2 Zab. 593.

It is further objected, that if the exclusive right ever vested in the lessees of the commissioners, it was forfeited prior to the act of incorporation by a failure to complete the bridge within the time limited by the proviso annexed to the 15th section. By that proviso, if the bridge was not completed within four years from the passage of the act, it was declared that it should be lawful for the legislature to repeal or alter the act.

By the act of 5th November, 1794, the time for the completion of the bridge was extended six months. It is

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urged that this act extending the time did not relieve the company from the forfeiture incurred by failing to complete the bridge within the period originally limited. The obvious answer to this objection is, that it does not appear that the bridge was not completed within the time originally specified. The act for the extension of the time was passed within four years from the date of the original act, and the preamble states that it was represented that the bridges were nearly completed, but that apprehensions were entertained that they might not be entirely finished before the term allowed by law for the purpose would expire. But there is no evidence whether, in point of fact, they were or were not finished within the time originally limited. But if the fact were proved, as alleged, there is nothing in the objection. The act extending the time, being passed before any forfeiture by nonperformance was incurred, clearly relieved against all consequences of nonperformance. There was, in fact, no failure to perform the contract. The extension of the time for performance by the act of 1794 operated precisely as if the time thus extended had been limited in the original act.

Lastly, it is urged that the complainants' right, if it ever vested in them, has been forfeited by their consent to the construction of other bridges across the river. There is nothing whatever in the objection. The right remains, except so far as it has been parted with by the complainants. There is no conceivable reason why a corporation, having the exclusive right of way across a river, should forfeit the right by consenting that one bridge should be constructed, any more than that the owner of land should forfeit his right to the soil, because he permits another to have a right of way across it. His right remains perfect, except so far as he has voluntarily consented to part with it.

I entertain no doubt that all the rights and privileges

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conferred by the act of 1790 passed under the contract of the commissioners to their lessees—not by the terms of the contract, but by force and operation of the act itself; that they continued in the company under their act of incorporation; and that they are now, for aught that appears in this case, in the complainants, as fully and effectually as they were originally conferred by the act, except so far as they have been parted with by the voluntary act of the corporation.

I am of opinion, therefore, that the proprietors of the bridges over the rivers Passaic and Hackensack have, by contract with the state, the exclusive franchise of maintaining said bridges, and taking tolls thereon, and that such contract is within the protection of that provision of the constitution which declares that no law shall be passed impairing the obligation of contracts.

The remaining inquiry is, whether the structure which the defendants are erecting is a violation of the complainants' right.

The act of 1860, under which the defendants are acting, authorized them to lay out, and construct and operate, a railroad from Hoboken to Newark, with power to erect and maintain the necessary viaducts over the Hackensack and Passaic rivers. The defendants, by their answer, allege that the bridge which they are erecting is solely for the purpose of completing their railroad, as authorized by the act. That it will be so constructed that no foot passenger or animal, nor any vehicle or carriage of any kind known or in use in the year 1790 (the date of the complainants' grant) can safely cross it; that the bridge is being constructed, and is intended to be used exclusively as a viaduct for their railway, for the passage of locomotives, engines, and railroad cars over the river, in their transit between Newark and Hoboken; and that the engines and cars cannot cross the river upon the bridge of the complainants, nor upon any bridge known or used in 1790.

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In terms, the grant of the complainants' franchise prohibits the building of any bridge whatever across the river. But every bridge built within the prohibited limits is not necessarily a violation of the grant. The complainants have not a monopoly of building bridges. They have the right of building one bridge, and the right of taking tolls thereon. The prohibition of other bridges was designed to prevent competition, and to give to the complainants the exclusive franchise of taking tolls within the limits specified. It is the exclusive right of taking tolls, not of having a bridge, that constitutes the value of the franchise. Whether, therefore, a bridge erected across the river is an infraction of the plaintiffs' franchise, must depend upon the purpose to which it is to be applied. The structure itself does not detract from the value of the franchise. The construction of an aqueduct for the passage of a canal or of water-pipes across the river, though a *bridge* and within the terms of the prohibition, would be no violation of the grant. Such structure clearly was not within the contemplation of the contracting parties.

To determine the true construction of the contract, recourse must be had to the subject of the contract and to the intent and particular objects of the grant.

The legislature, by the act of 1790, were making provision for increasing the facilities of communication between Newark and Powles-hook by the ordinary methods of travel upon the public highway. Provision was made for opening a new road, and substituting bridges for ferries upon the route. To the persons undertaking the work, a grant was made of the franchise of building and having the bridges, and of taking tolls thereon. The character of the bridges to be built was adapted to the modes of travel then known and used. The franchise of taking tolls was limited to the same objects. The lessees are authorized to take tolls for foot passengers, persons on horseback, wheel carriages and sleighs drawn by horses and oxen, and for domestic animals. Since the grant of

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the complainants' franchise, a new motive power has been introduced, with new appliances for transportation by engines and cars, requiring a new description of track totally dissimilar in character from the ordinary highways in use in 1790. The accommodation of this new character of road and means of transportation could not have been within the contemplation of the legislature in the grant of the franchise. The complainants have no franchise of taking tolls for locomotives or cars. The franchise cannot, by implication or construction, be extended to include them. The grant in this particular, as in all others, must be construed strictly. *The Proprietors of the Stourbridge Canal v. Wheely*, 2 Barn. & Ad. 792.

Again, the character and description of the bridges to be built by the complainants are adapted only to the modes of travel then known and used upon the ordinary highways. Nor have the complainants any right to adapt their bridges to the accommodation of railroad travel. By the terms of the lease, the bridges specified in the act and agreement are to be kept in repair, and are to be delivered up at the expiration the lease. The proprietors have no authority to convert the causeway and bridges to the purposes of a railway. The two methods of travel upon the same bridge are incompatible with public safety and detrimental to the public interests. If converted to the purposes of a railway, the bridge must be abandoned or remain comparatively useless for the purposes of ordinary travel, thus defeating the very object for which the bridge was erected and the franchise granted, viz. the accommodation of travel upon ordinary highways. To guard against this evil, the legislature, when conferring power upon the New Jersey Railroad Company to purchase the capital stock of the turnpike roads and bridges on the route of their road, coupled with it a proviso, that the Newark turnpike, and the bridges over the rivers Hackensack, Passaic, and Raritan, should be preserved without obstruction as public roads, as heretofore. The

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complainants are thus prevented from maintaining a bridge for the accommodation of railway travel. They have neither the franchise of having a railroad bridge nor of taking tolls from railway passengers.

The design of the act, moreover, was to accommodate the entire travelling public. The bridges are declared to be a public highway, free for all citizens to pass over on paying the accustomed toll. But the bridges are free only to those travelling by usual and known methods upon the public highway. They are not free to the great mass of the travelling public. The great torrent of railroad travel must seek another channel. The complainants are neither required nor allowed to accommodate it. Aside from the restrictions which have been imposed upon them by the terms of their contract and by legislative enactment, they never could have supposed that they were required to furnish facilities for a railway, or for locomotives and trains of cars, to cross the bridges. It was not within the scope of their contract. If the bridge proprietors were not bound to accommodate the railway traffic, were the legislature restrained by the terms of the grant from providing facilities for railroad travel? The bridge company were required to accommodate all travel upon the public highway. From these travellers they had the exclusive franchise of taking toll. The legislature engaged that no other bridge to accommodate that character of travel should be built, and that the whole of it should enure to the benefit of the complainants. But they did not oblige themselves to compel travellers to adopt that mode of travelling, nor deprive themselves of the right of sanctioning better and more expeditious methods. Applying to this contract the ordinary rules of interpretation; having regard to the subject matter of the contract itself; considering that it related solely to the travel upon ordinary highways by methods then known and used, and that the complainants' franchise extended only to such travel, the construction of a rail-

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road bridge for the sole accommodation of railroad travel cannot be deemed an infringement of the complainants' rights.

Again, the complainants' franchise consists in the right of taking toll for crossing the river. But the defendants' structure is not a toll bridge. They have no franchise of taking tolls. They have no right to charge for crossing the river, any more than if it were not in existence. The structure which they are erecting is not a mere connection between the opposite shores—it is part of an extended line of railway, connecting distant points, over which the defendants are to transport passengers at a stipulated rate. Nor is it a *free* bridge, by which parties may evade paying toll upon the complainants' bridge to the prejudice of their franchise. Its character and purpose are in fact essentially different from that of a bridge used merely as a connecting link for the transfer of passengers between the opposite shores of a river.

Public grants are to be strictly construed. Contrary to the rule adopted in the case of private contracts, they are to be taken most strongly against the grantee and in favor of the public. If there be a doubt as to the extent of the grant, the doubt is resolved in favor of the public. This is especially true of all grants which, like the present, narrow the powers or abridge the functions of government. This grant is in derogation of public right. It restrains the sovereign power. It narrows the exercise of the great duty, which the sovereign owes the people, of furnishing convenient highways.

In the case of *The Mohawk Bridge Co. v. The Utica and Schenectady Railroad Co.* (6 Paige 564) the bridge company claimed the exclusive right to convey passengers across the river—the right extending one mile above and below the bridge. The act, in terms, restrained only the erection of ferries within those limits, but the complainants claimed that the prohibition extended to bridges or to any mode of transporting freight and passengers across

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the river. It was held that the prohibition of erecting ferries did not prevent the erection of a bridge. "Much less (says the Chancellor) is the legislature deprived of the power to provide for the conveyance of freight or passengers from one part of the state to another, by an improvement which was entirely unknown at the time when the grant to the bridge company was made. And if that grant had, in terms, given to the corporation the exclusive right of erecting a toll bridge across the river at Schenectady, this subsequent grant to the railroad company to cross the river with their railway from Schenectady to Utica, and to transport passengers thereon, in the ordinary course of their business in the conveyance of travellers from one place to another, would not have been an infringement of the privileges conferred by such prior grant, as the railroad bridge could not be a toll bridge within the intent and meaning of the grant to the first company. Grants of exclusive privileges being in derogation of public rights belonging to the state, or to its citizens generally, they must be construed strictly, and with reference to the intent and particular objects of the grant." This case is cited with approbation by the court in *Thompson v. The N. Y. and Harlem Railroad Co.*, 3 Sandf. Ch. R. 657.

In *McRee v. The Wilmington and Raleigh Railroad Co.*, 2 Jones' Law R. 186, it was held by the Supreme Court of North Carolina, that the franchise of having a bridge and taking tolls was not violated by extending a railroad across the river. The case, in many of its essential features, was like the present. The legislature of North Carolina, in the year 1766, had granted to an individual and his assigns the franchise of building a bridge across the Northeast branch of Cape Fear river, and the bridge, when built, was declared to be vested in the grantee, his heirs and assigns for ever. The act provides that when the bridge was built, it should not be lawful for any person whatever to keep any ferry, *build any bridge*, or set

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any person or persons, carriage or carriages, cattle, hogs, or sheep, over said river for fee or reward, under the penalty of twenty shillings. The court decided that notwithstanding the grant of the franchise of taking tolls, and notwithstanding the provision of the act, that it should not be lawful to build any other bridge across the river, the legislature had the power to grant the defendants a right to construct a railroad across the river, and to consider the transit over the river as a part of the road.

It is material to observe that the structure of the defendants is not designed as an evasion of, or fraud upon the rights of the complainants. It is not an attempt to carry passengers across the river, either free or for toll, in evasion of the complainants' franchise. The avowed purpose of the defendants is to construct and complete a continuous line of road from Newark to Hoboken, and to transport passengers over the entire route. The diversion of travel from the complainants' bridge, and the consequent loss of tolls, is an incidental consequence of opening a new route of travel, of which the complainants have no legal right to complain.

But the complainants do not rely upon the act of seventeen hundred and ninety alone to support their claim. It is charged, in their bill of complaint, that the New Jersey Railroad Company purchased, at a great advance over the par value, and now hold over nine hundred and fifty shares of the one thousand shares that constitute the capital stock of the bridge company; that in the contract giving to the railroad company permission to erect their bridge across the Hackensack and Passaic, large advantages were secured to the other stockholders of the bridge company; that the railroad company made such purchase and contract on the faith of the contract made by the state with the bridge company, believing that the contract of the state would be observed, and could not be violated, and that no other bridge could be erected within said limits so as to interfere with the business and income of

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the bridge company or with the business and income of the railroad company without the consent of the complainants, unless upon full compensation to them and to the railroad company for the damage and loss which each of them might sustain by the erection of a new bridge.

This charge doubtless discloses the *gravamen* of the complainants' bill. The injury which they apprehend is not so much the loss of tolls by the bridge company as the diversion of travel and traffic from the railroad. The complaint is virtually that of the railroad company, who insist that, by the purchase of the franchise granted by the legislature to the bridge company of taking tolls for crossing the river by travellers upon the ordinary highway, they have secured the monopoly of the right of way for a railroad across the rivers. Can such claim be well founded? Could such result have been within the contemplation of the legislature? Was it within the design or purpose of the grant? And if the claim be sustained, will it not be extorting from the legislature, under color of a grant for a totally different purpose, exclusive privileges which never would have been conferred by direct legislation? It is charged, in the complainants' bill, that the contract with the bridge company was authorized by the legislature for the express purpose of giving to the railroad company the control of the right of way. If such was the design of the legislature, it would have been easy and natural to make the grant in express terms. A totally different design is patent upon the face of the act. The bridge company, doubtless then as now, claimed that the construction of a railroad across the river would be an infringement of their franchise. The legislature naturally regarded it as just and equitable that compensation should be made for any loss they might sustain by the grant of the railroad charter. Doubts existed as to the extent of the complainants' franchise, and the railroad company may have naturally believed that it would be for their interest to purchase it. They may have hoped thus to

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receive the advantage which they now claim ; but that such result was within the contemplation of the legislature is not apparent upon the act, and cannot be inferred from it. If the railroad company believed, as it is charged in the bill, that by the grant they acquired the control of the right of way for railroads, they suffer the consequences of their own mistake ; but their belief cannot tend to enlarge the franchise or change the character of the grant.

The complainants also insist that their rights have been repeatedly recognised by the legislature, and that, by the act of 1860, it is expressly provided that compensation shall be made for their franchises, and that the defendants are prohibited from constructing their bridges until such compensation is first made or tendered.

The legislature have, on frequent occasions, manifested a laudable regard for the public faith by sedulously guarding the chartered rights of the complainants. To this end there have been inserted in various legislative grants express provisions, that nothing therein contained should be construed, in any manner, to impair their rights or privileges or other clauses designed to preserve their rights inviolate. But these and similar provisions are designed simply to protect existing rights, not to create or enlarge them. The character and extent of the rights are to be sought for in the grant itself and in express legislative recognition of its limits. Such recognition, it is believed, will be no where found, except it be in the act of 1860, which confers upon the defendants power to construct their road. The legislature had an undoubted right, in conferring that power, to impose upon the defendants such terms as they saw fit. The grant of power is exceedingly broad ; and if, in making it, the legislature deemed it just and equitable to require that the defendants should compensate the complainants, not only for the value of their franchises, but also for all loss or damage which they or their grantees, the New Jersey Railroad and Transportation Company, might

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sustain by the construction of a new road, and the consequent diversion of travel, the requisition is binding, and the complainants are entitled to the aid of this court to enforce a compliance with its terms.

A casual reading of the law seems to justify the inference that the legislature intended that the Hoboken Land and Improvement Company, as a compensation for the rights and property of the bridge company and of the New Jersey Railroad Company, which they were authorized to appropriate, should pay not only for all the rights and franchises *owned*, but for all *claimed* by them. But no such inference can be legitimately made in the absence of an express grant. Upon the most careful consideration of the law, I find no such provision. The legislature have, by the terms of the act, manifested a clear intention to confer all necessary power to construct the road, and that no property, right, or franchise of the complainants or of the railroad company should stand in the way of its completion. On the other hand, there is an equally clear intention that the defendants should make compensation for all property, rights, and franchises so taken and appropriated.

The provisos of the 1st and 8th sections of the act reserve to the complainants their right of compensation under the 5th and 6th sections. The 8th section authorizes the defendants to run their engines and cars upon any bridge of any corporation, and the application of the proviso to that section is sufficiently obvious. The proviso of the 1st section authorizes the defendants, in case they are enjoined or prevented by legal proceedings from constructing and using their own bridges, to use the bridges and track of the New Jersey Railroad Company, "*reserving, notwithstanding such consent,*" to the complainants their right of compensation under the 5th and 6th sections. No *consent* had previously been mentioned. The provision, as it stands, is unintelligible. The defendants, by their answer, explain the incongruity by

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stating that the section, as it originally stood, required the consent of the railroad company to the use of their road; and the last clause was inserted to guard against *such consent* by the railroad company operating to the prejudice of the bridge company; but that the clause requiring the consent of the railroad company being stricken out, the clause protecting the rights of the bridge company was inadvertently and inappropriately retained. This explanation in no way affects the inference which the complainants draw from the language of the section. They insist that, by this section, compensation is reserved to the complainants in case the defendants use the track of the New Jersey Railroad Company for the passage of their cars; and that the complainants can be entitled to no such compensation, unless the use of the railroad track, and the transportation of passengers thereon, was regarded by the legislature as a violation of their franchise, for which they intended to provide compensation.

But it must be borne in mind that the act reserves to the bridge company only their right of compensation under the 5th and 6th sections of the act; and it is too clear to admit of question that those sections provide compensation only for rights *owned*, not for rights *claimed*. They do, indeed, provide a way in which persons, either owning or claiming rights, may have those rights adjudicated. But the commissioners appointed to make the valuation are to report "what (if any exist) and how much, and what part of any rights, privileges, franchises, and property are necessary to be taken and appropriated, exercised, or used for the purposes of the act, and to make a just and equitable assessment or appraisal of the value of (if any such exist) the said rights, privileges, franchises, and property, or so much thereof as may be necessary."

The plain language of the act, as well as the manifest reason and justice of the thing, requires that the defend-

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ants should make compensation, not for franchises claimed, but for franchises owned—not for imaginary, but for existing rights.

I find nothing in the act to sustain the claim of the complainants. The defendants have not entered upon their land nor taken their bridges. They have taken no right, privilege, or franchise of the complainants for which they were required to make or tender compensation.

I am of opinion, therefore, that the motion for an injunction must be denied, and the complainants' bill dismissed with costs.



FRANCIS A. CLEVELAND et ux. vs. CHARLES G. HAVENS,
 executor, &c., and others.

Where the terms of a bequest of personalty are such as would, in a devise of real estate, create an estate tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void.

Where the gift is to A. and his issue, or to A. and the heirs of his body, and the limitation over is upon an indefinite failure of issue, the estate vests absolutely in the first taker.

But where the limitation over is upon a definite, not an indefinite failure of issue, the first legatee takes an estate for life only, and the limitation over is good. And it is immaterial in such case whether the gift to the first taker be of the subject itself or only of the use.

The law requires wills, both of real and personal estate, to be in writing, and parol evidence is not admissible to add to, contradict, or vary their contents.

Lewis R. Grover, for complainants.

THE CHANCELLOR. The bill is filed by a legatee under the will of Eliza H. Marsiglia, to settle the construction of a bequest contained in the will and to enforce the payment of the legacy. The bequest is as follows: "I give,

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devise, and bequeath the remaining one equal half part of all the rest, residue, and remainder of said trust property, and of any and all other property, of every kind and description, belonging to me at the time of my decease, to my said daughter Catharine and to her lawful issue. But in case of the death of my said daughter Catharine without leaving lawful issue living at the time of her decease, then I give, devise, and bequeath the same to my said daughter Ada and to her lawful issue. And should both of my said daughters so die without leaving lawful issue surviving, then I give, devise, and bequeath the same, or so much thereof as may remain, to John Pienezoe and Frances Chanwand (my children by my former husband, John J. Chanwand,) equally and to their heirs for ever."

The property disposed of by the bequest was the sum of six hundred dollars in money.

The will purports to give a legacy to Catharine, the daughter of the testatrix, and on her death to her issue; but if she died without issue living at the time of her death, then over (to Ada, another daughter of the testatrix).

It is claimed, on the part of the complainant, that under the terms of the gift the legacy vests absolutely in Catharine, the first legatee.

Where the terms of a bequest of personalty are such as would in a devise of real estate create an estate tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void. *Lyon v. Mitchel*, 1 *Mad. R.* 467, (1st *Am. ed.*) 253. 2 *Roper on Leg.* 1520, c. 22, § 1.

When the gift is to A. and his issue, or to A. and the heirs of his body, and the limitation over is upon an indefinite failure, the estate vests absolutely in the first taker.

But when the limitation over is upon a definite, not an indefinite failure of issue, the first legatee takes an estate for life only, and the limitation over is good.

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In the present case the bequest over is made upon a definite failure of issue. It is upon the death of Catharine without leaving lawful issue living at the time of her death. Terms cannot be more explicit. The limitation over is upon a definite failure of issue. The bequest over in such case will be supported. The first legatee takes but a life interest, and it is immaterial whether the gift be of the subject itself or only of the use. *Hyde v. Parrott*, 1 P. Wms. 1; *Tissen v. Tissen*, *Ib.* 502; *Upwell v. Halsey*, *Ib.* 652.

The terms of the will admit no doubt that the complainant is entitled only to the use of the money for life; that upon her death leaving issue the principal vests absolutely in the children, and in default of issue, then over to the other legatees named in the will.

The case is not altered by the answer of the executor. His consent to a decree against him cannot affect the rights of the real parties in interest. He is a mere trustee. He takes no interest under this part of the will. The parties really in interest are those to whom the money is given upon the death of the complainant, and though they fail to appear and make defence the court will not decree against them contrary to the clear right of the case. But their interest is contingent only, and it may well be doubted whether, even with their consent, the court would be justified in making the decree prayed for, or whether such decree, if made, would afford protection to the executor against the claims of those whose interests may render the provisions of the will accrue hereafter.

The executor not only assents to the decree as prayed for, but he also admits the truth of sundry charges in the bill, and states facts, the benefit of which is claimed by the complainant as establishing the truth of the charges made by the bill.

It is stated, among other things, by the answer of the executor, that he drew the will in question at the request and under written instructions from the testatrix, and

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that he was instructed to give the trust money in the bill mentioned, being the sum of \$600, then in his hands as trustee, absolutely to Catharine, one of the complainants; that he intended so to draw the will; he knows the testatrix so understood the will to read, and the executor himself so construed it, and he proffers himself ready to pay the money to the complainants under the order and protection of the court.

Aside from all exceptions that might be taken to these statements and admissions on the part of the executor, as evidence to affect the rights of parties having interests under the provisions of the will, treating it as legal and competent evidence in the cause, is the evidence in itself competent? It embraces two objects. Its purpose is to prove—1. That the will was not drawn in pursuance of the written instructions given by the testatrix. 2. That the testatrix and the scrivener understood the will differently from its legal import. But parol evidence is competent for neither of these purposes.

The law requires wills, both of real and personal estate, to be in writing, and parol evidence is not admissible to add to, contradict, or vary their contents. "No principle," says Mr. Jarman, "connected with the law of wills is more firmly established or more familiar in its application than this: and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views." 1 *Jarman on Wills* 349.

The judgment of a court in expounding a will is to be simply declaratory of what is in the instrument. *Wigram on Wills*; *Greenl. on Ev.* § 290, note; 1 *Jarman on Wills* 358.

There are no latent ambiguities to be removed. The words of the will are clear, and have a definite and well ascertained meaning. In such case no extrinsic evidence to show a different meaning can be admitted.

See the cases cited in 1 *Jarman* 348, note 1; *Mann v. Ex'rs of Mann*, 1 *Johns. Ch. R.* 231.

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These principles have been repeatedly recognised in this state. *Hand v. Hoffman*, 3 Halst. 71.

There is nothing in the case that will warrant a decree in favor of the complainants.

The bill must be dismissed.

STEPHEN FAIRCHILD, executor of Scott, vs. AARON CRANE
and others.

Words in a will, which if applied to real estate would create an estate tail, will vest personal estate absolutely in the legatee.

Consequently a bequest of personal property to take effect on the death of the first legatee *without issue*, or on the failure of *heirs of his body*, without other restriction, is too remote.

But it is equally well settled that a legacy of a chattel interest generally, or for life, or for any number of lives in being, and limitation over upon the failure of issue confined to twenty-one years after a life in being, is good.

A testator bequeathed the interest of the fund to his wife during her life, and upon her death he gave the fund to his two sisters, Eliza and Susan, in equal shares, "during their lifetime," and upon the death of either of them to the survivor, "for her lifetime;" but if both or either of them should die leaving a child or children, the share of each, "so bequeathed for her lifetime only," to go to her child or children. If one should die leaving a child or children, and the other should die leaving no child, the shares of both to go to such child or children. If both should die "leaving no heir or heirs, the shares of both to go to the children of testator's sister Augusta; but should she have no children living at the time the above bequeathed property should have lawfully gone from the possession of the testator's wife, and also from the possession of either or both of her sisters, Eliza and Susan, then the property bequeathed to become the property of all the other legal representatives of the testator.

Held, that the bequest over upon the death of the testator's sisters was not upon their death *without issue* or upon the *failure of issue*, but upon their dying "leaving no children," and that those terms import leaving no children at the death of the legatees.

Also, the bequest being upon the death of either of the sisters without issue "*to the survivors*," it imports that the testator intended the bequest to take effect upon a definite failure of issue, and consequently the sisters take only the use of the fund for life.

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T. Little, for complainant.

THE CHANCELLOR. The only question submitted for consideration is whether, under the terms of the will, the sisters of the testator, Eliza and Susan, took an absolute interest in the legacies bequeathed to them.

The testator bequeathed to his wife the interest of the fund in question during her life, and upon her death he gives the fund to his two sisters, Eliza and Susan, in equal shares, "during their lifetime," and upon the death of either of them to the survivor, "for her lifetime." But if both or either of them die leaving a child or children, the share of each so bequeathed for her lifetime only" to go to her child or children. If one die leaving a child or children, and the other die leaving no child, the shares of both to go to such child or children. If both die "leaving no heir or heirs," the shares of both go to the children of the testator's sister Augusta Decamp; but should she have no children living at the time the above bequeathed property shall have lawfully gone from the possession of the testator's wife, and also from the possession of either or both of his sisters, Eliza and Susan, then the property bequeathed is to become the property of all the *other legal representatives* of the testator.

By a subsequent clause of the will, the executor is directed to invest the fund on mortgage security, and to pay the interest to his wife during her life, and after her death to his sisters, Eliza and Susan, or interest and principal to their child or children, or to the child or children of his sister Augusta or other legal representatives, in conformity with the devises before made.

Nothing can be more clear, from the whole structure of the will, than that the testator designed that his sisters should take the interest only, and in no contingency the principal of the fund; that upon their or either of their death leaving children, it should go to such children, and in default of such children, to the children of his sister

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Augusta, and in default of her children to all the other legal representatives of the testator.

It should be a clear and well settled rule of construction, and obvious in its application, that would operate to defeat a purpose so clearly expressed, and to give the fund absolutely to the sisters in exclusion of the subsequent legatees.

Words in a will, which if applied to real estate would create an estate tail, will vest personal estate absolutely in the legatee. *Fearne on Rem.* 841, 873; 2 *Jarman on Wills* 488; 2 *Story's Eq.* § 990; *Lyon v. Mitchel*, 1 *Mad.* (11 *m. ed.*) 253; and, consequently, a bequest of personal property to take effect on the death of the first legatee *without issue*, or on the *failure of heirs* of his body, without other restriction, is too remote. *Fearne on Rem.* 841.

But it is equally well settled that a legacy of a chattel interest generally or for life, or for any number of lives in being, and then a limitation over upon the failure of issue, confined to twenty-one years after a life in being, is good. *Fearne on Rem.* 320, 376—8; 4 *Kent's Com.* 267.

The real question is, whether the limitation over upon the death of the testator's sisters is upon a definite or an indefinite failure of issue. If the former, the sisters take only the use of the fund for life, and the subsequent bequest is good—if the latter, the language would create an estate tail in real estate, but of the personalty it creates an absolute gift, and the limitation over is void.

The bequest over upon the death of the testator's sisters is not upon their death *without issue* or upon the *failure of issue*, but upon their dying "*leaving no children.*" These terms import not a failure of issue at any indefinite future period, but a dying without children leaving no children at the death of the legatee.

The term "children," as here used, imports not succession or limitation, but denotes the legatees who are to take on the death of the testator's sisters, *viz.* their children who may *then* be living. The term, in its natural

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import, is a word of purchase, and not of limitation. *Buf-
far v. Bradford*, 1 *Atkyns* 220.

The bequest, moreover, upon the death of either of the sisters without issue is to the "survivor," which imports that the testator intended the bequest to take effect upon a definite failure of issue. *Den v. Schenck*, 3 *Halst.* 29; *Den v. Combs*, 3 *Harr.* 27; *Den v. Allaire*, *Spencer* 6.

In one clause of the will, that in which the property is limited over to Augusta Decamp, this language is employed, viz. "in case my two sisters die leaving no heir or heirs," and the limitation over is upon that contingency. But it is obvious, from the previous and subsequent provisions of the will, that the testator here used the terms heir or heirs as synonymous with child or children. The will must be construed accordingly. *Loveday v. Hopkins*, *Ambler* 273; *Shepherd v. Nabors*, 6 *Ala.* 631.

The case does not fall within the principle of *Kay v. The Executors of Kay*, 3 *Green's Ch. Rep.* 495.

If there were room for doubt upon the previous clauses of the will, the final disposition of the fund removes all uncertainty as to the nature of the contingency upon which the limitation over is made to depend. The direction of the testator is, that the property shall go to all his other legal representatives in case his sister Augusta should have no children living at the time that the property shall have gone from the possession of his wife and from the possession of his sisters. The gift to the children of his sister living at the time that the property shall have passed from all the prior legatees shows that all the previous bequests must have been limited upon a definite failure of issue.

The terms of the will, if applied to real estate, would not create an estate tail in the sisters of the testator, and do not vest in them an absolute right to the personalty. They take only the interest of the fund for their respective lives, and upon their deaths it goes over, in accordance with the directions of the will.

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This conclusion will be found to be sustained by the following, among many other cases. *Hughes v. Sayer*, 1 P. Wms. 534; *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Stone v. Maule*, 2 Simons 490.

JANE SCUDDER'S executors vs. ISAAC VANARSDALE and others.

Testatrix was possessed of personal and real estate, and by her will directed the latter should be sold by her executors, and after giving numerous pecuniary legacies, principally among her relatives and the relatives of her deceased husband, she added, "and if there is anything over and above left, let it be equally divided among all the heirs."

Held, that the word heirs, in the above connection, means "next of kin."

Where money or personal property is bequeathed to the heirs of A. or to the heirs of the testator, if there be nothing in the will showing that the testator used the word in a different sense, the next of kin are entitled to claim under the description as the persons appointed by law to succeed to personal property.

It is also a well settled rule in equity that where lands are directed to be converted into money, and the proceeds given as a legacy, it will be treated as a legacy of personal estate.

Where the property under a bequest passes to the persons entitled under the statute of distributions to receive it, in the absence of any express directions in the will it will go in the proportions prescribed by the statute. In such case, where they are not all in equal degree the children of a deceased parent will take by right of representation *per stirpes*, and not *per capita*.

But in this case the direction being that the fund shall be divided equally among all the heirs, the direction must prevail, and the legatees take *per capita*.

This case was disposed of on final hearing.

James Wilson, for complainants.

T. H. Dudley and John F. Hageman, for defendants.

THE CHANCELLOR. This bill is filed in order that the accounts of the executors may be duly settled, and to that

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end that the will may be construed, and its true meaning established under the authority of the court.

The question submitted for the consideration of the court is the true construction of the residuary clause of the will of Jane Scudder.

The testatrix died in 1855, seized and possessed of personal and real estate. By her will she directs that her real estate should be sold by her executors as soon as they conveniently can, and the accounts settled. She distributes (principally among her relatives and the relatives of her deceased husband) numerous pecuniary legacies, amounting to \$16,950. She also bequeaths a few specific legacies. After giving these legacies, the testatrix adds, "*and if there is anything over and above, let it be equally divided among all the heirs.*"

A great variety of constructions is sought by parties in interest to be put upon this clause. It is claimed that the testatrix intended that the residue should be divided, as the clause literally imports, among her heirs at law, among her next of kin, among her own and her husband's next of kin, among all the *legatees* named in the will. Among these and other conjectures that may plausibly be made as to the meaning of the testatrix, the further conjecture may be hazarded, that neither the testatrix herself nor the inexpert scrivener who drew the will had any very clear apprehension of her own meaning.

Fortunately for the cause of justice and the rights of the legatees, the construction of the will is not to be left to conjecture, but must be settled by well defined principles and according to acknowledged rules of interpretation.

Where money or personal property is bequeathed to the heirs of A. or to the heirs of the testatrix, if there be nothing in the will showing that the testator used the word in a different sense, the next of kin are entitled to claim under the description as the persons appointed by law to succeed to the personal property. *Holloway v.*

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Holloway, 5 *Vesey* 399; *Vaux v. Henderson*, 1 *Jac. & Walk.* 388, note; *Evans v. Salt*, 6 *Beav.* 266; *Price v. Lockley*, 6 *Beav.* 180; 2 *Wms. on Executors* 996; *Lowndes v. Stone*, 4 *Vesey* 649; *Wright v. Trustees of Meth. E. Church*, 1 *Hoffman's Ch. R.* 212; *Ferguson v. Stewart's executors*, 14 *Ohio* 141; *Corbit v. Corbit*, 1 *Jones' Eq. Rep.* 114; *Henderson v. Henderson*, 1 *Jones' (same)* 221; *Evans v. Gaddbold*, 6 *Rich. Eq. R.* 26.

In *Gittings v. McDermott*, 2 *Mylne & Keen* 69, it was urged that the word "heirs" is of ambiguous import when applied to a legacy. But the master of the rolls said, in reply, there is really nothing in this objection; "for the sense in which this word shall be taken when applied to personalty is fixed by many decisions."

In *Mounsey v. Blamire*, 4 *Russell* 384, the master of the rolls held that when a legacy is given by a testator to his heir, unless controlled by the context of the will, the heir at law will take the legacy, and not the next of kin. He distinguished between the meaning of the word as used to denote succession and where it is used not to denote succession but to describe a legatee. He said, where the word "heir" is used to denote succession, there it may well be understood to mean such person or persons as would legally succeed to the property according to its nature and quality, as in *Vaux v. Henderson* and in the familiar case of a gift to a man and his heirs. But when the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word "heir." In *Vaux v. Henderson* the bequest was to Edward Vaux, "and failing him by decease before me, to his heirs." In such case the phrase "to his heirs" is used to describe the legatee, and no more denotes succession than if the legacy had been to the heirs of B. or to the heirs of the testator himself. It will be difficult to distinguish in construction

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between a legacy "to A., and on his death to his heirs," and a legacy to "the heirs of A.," or between a legacy "to the heirs of A." and a legacy "to my heirs," or to assign a satisfactory reason why in one case the legacy should go to the next of kin, and in the other to the heirs at law.

The more rational rule of interpretation, and the one more likely to attain the end of all construction, viz. to effect the intent of the testator, is that the term "heir" is to be construed in reference to the species of property which is the subject of disposition, and that when used with reference to personal property it means *next of kin*.

It may be added in this case, aside from the general rule of interpretation, that the heirs at law of the testatrix were two brothers, who, among many other relations, were named in the will; and if her intention had been to give the residue to them, she would naturally have done it in express terms, and not have directed it to be *divided among all the heirs at law*.

It appears by the bill that the inventory of the personal estate of the testatrix amounted to \$13,846.48, and that the sales of the real estate amounted to \$11,006, making the total estate \$24,852.48. The pecuniary legacies amount to \$16,950 besides certain specific legacies. These legacies, aside from the debts and commissions, more than exhaust all the personalty, so that the residue consists in fact of the proceeds of the sale of the real estate; and hence it is argued that the term heirs should receive its strict technical interpretation, and should be construed to mean the heir at law and not the next of kin.

The whole estate is treated and disposed of as personalty. The executors are ordered to sell the real estate, and convert it into money. The testatrix manifestly regarded it as such, and treated the whole estate as one entire fund.

It is a well settled rule in equity, that when lands are directed to be converted into money, and the proceeds

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given as a legacy, it will be treated as a legacy of personal estate. *Yates v. Compton*, 2 P. Wms. 808; *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497; *Craig v. Leslie*, 3 Wheat. 563; *Ferguson et ux. v. Stuart's ex'rs*, 14 Ohio R. 14.

It is more material, however, for the purpose of effectuating the intention of the testatrix to observe that she did not distinguish between the real and personal estate, but treated it all as one fund, and bequeathed it as personalty.

When the property under a bequest passes to the persons entitled under the statute of distributions to receive it, in the absence of any express direction in the will, it will go in the proportions prescribed by the statute. In such case where they are not all in equal degree the children of those deceased will take, by right of representation, *per stirpes* and not *per capita*. *Roach v. Hammond*, Prec. in Chan. 401.

But the will in this case expressly directs that the fund shall be divided *equally* among all the heirs. In such case the direction must prevail, and the legatees take *per capita*. *Thomas v. Hole*, Cas. Temp., Talbot 251; *Butler v. Stratton*, 3 Bro. C. C. 367; *Blackler v. Webb*, 2 P. Wms. 383.

Among other constructions sought to be given to the residuary clause, it is claimed that the testatrix, by the term "heirs" meant "legatees," and that the design was to distribute the residue as well among her husband's relatives as her own. This construction may be adopted where such intention is manifest. *Collier v. Collier's ex'rs*, 3 Ohio State R. 369.

But no such intention is manifest on the face of this will, nor is there anything from which such intention can be legitimately inferred. A conclusive objection moreover to this construction is, that there are included among the legatees servants and others, who are of no kin either to the testatrix or her husband.

The offer to prove by parol what was the intention of the testatrix is clearly inadmissible.

Decree accordingly.

Bennet v. Bennet.

BENNET vs. BENNET.

At common law the father, in the first instance, is entitled to the custody of his children, but courts will exercise a sound discretion for the benefit of the children in disposing of their custody.

The act of the 20th of March, 1860, has materially altered the rule of the common law, and has, to a certain extent, deprived the court of this exercise of its discretion in disposing of the custody of children. By this act the custody of the children within the age of seven years is transferred from the father to the mother.

This act is not unconstitutional, nor is it void as being incompatible with the fundamental principles of government.

The petition for the writ of *habeas corpus* in this case was filed on the 28th of March, 1860. The petitioner represents that she is a married woman, the mother of two infant children of tender years, viz. a daughter, who completed her fourth year in July, 1859 and a son, who completed his third year in January, 1860. That the father, in January last, left his residence, taking with him the child of a former marriage and the two children of the petitioner, and has since resided separately from the petitioner, detaining her children from her care and custody, doing violence to the feelings and affection of the mother and to the injury of the present welfare and future good of the children. The writ issued returnable on the 8d of April last.

The time for the return of the writ having been extended beyond the return day by consent of parties, and the production of the bodies of said infants having been dispensed with by like consent until otherwise ordered by the court on the 25th of April, an order was made on the application of the petitioner, that return be made to the writ, except so much of the same as requires the production of the bodies of said infants on the first day of May, upon four days' service of a copy of the order.

The writ, with the answer of the defendant, was re

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turned and filed on the 5th of May. On the 15th of May, on the application of the petitioner, and with the assent of the defendant's counsel, leave was given to the petitioner to file an answer traversing the return, it being understood that the defendant would be at liberty to file a replication to the petitioner's answer. It was at the same time further ordered that, upon the answer being filed, both parties should have leave to take testimony to be used on the hearing of the cause, and that the same be brought to hearing on the 18th of June without further notice. The answer was filed on the day of the date of the order. Testimony was taken, on the part of the petitioner, between the 8th and the 16th of June. No replication was filed by the defendant to the answer of the petitioner made to the defendant's return nor was any evidence taken on the part of the defendant.

The hearing was postponed from time to time, by consent of counsel, until the third of July, when the cause was brought to hearing. Before the opening of the case the defendant's counsel applied for further time for taking testimony, which having been denied, the cause was argued July 3d, 1860.

Dodd and Frelinghuysen, for the petitioner.

Bradley, for the defendant.

THE CHANCELLOR. The petitioner, the mother of two infant children of tender years, asks the restoration of the children to her care and custody, from which they were taken by her husband, the father of the children. The husband and wife are living in a state of separation without being divorced. The children are both under the age of five years, and are now living with the father and under his control.

There is no question but that at the common law the father, in the first instance, is entitled to the custody of his children. Courts will, however, exercise a sound dis-

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cretion for the benefit of the children in disposing of their custody. If the infants are within the age of nurture, or the father is manifestly unfit to have charge of them, they will be committed to the care of the mother; and when both parents are grossly ignorant, immoral, and unfit to be intrusted with the care and education of the children, the court may order them to be placed in the custody of a third person. In all these cases they act for the good of the children, to which the rights of the parents and their control over them are subordinate.

The act of the 20th of March, 1860, *Pamph. L. 437*, has materially altered the rule of the common law, and has, to a certain extent, deprived the court of the exercise of its discretion in disposing of the custody of the children. It provides that when the husband and wife shall live in a state of separation without being divorced, and shall have any minor child or children of the marriage, the court or judge before whom the children may be brought upon *habeas corpus*, if the children are under the age of seven years, shall make an order that they be delivered to and remain in the custody of the mother until they attain such age, unless said mother shall be of such character and habits as to render her an improper guardian for such children.

The case now under consideration falls directly within the provision of the statute. The husband and wife are living in a state of separation without being divorced. The children are under seven years of age. Under such circumstances the statute is imperative that the children shall be delivered to and remain in the custody of the mother. The court has no discretion to exercise. The right to the custody of the children is transferred by force of the statute from the father to the mother. That right the court are to enforce, unless the mother shall be of such character and habits as to render her an improper guardian for her children. That contingency must be proved to exist—it will not be presumed. As the law

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stood before the passage of the act the father was entitled to the custody of the children, unless he was of such character and habits as rendered him an improper guardian for his children. By force of the act the mother, under the limitations specified in the statute, is entitled to the custody of the children, unless she shall be of such character and habits as to render her an improper guardian for her children. In either case the disqualification must be established by proof. The mere fact that the husband and wife are living in a state of separation raises no presumption against her. It is to that very condition—a separation between husband and wife—that the operation of the statute is in terms limited. Nor will the disqualification be established by evidence of the fact, that the separation was partially or even wholly the fault of the mother. The circumstances attending a separation between husband and wife may tend strongly to establish a character which would disqualify the wife from having the guardianship of her children. On the other hand, it is easy to conceive of a separation produced by a wife, who might nevertheless be a fond and devoted mother and a proper guardian for her children.

The court happily is not called upon to enter upon the details of the unhappy controversy between these parties nor to decide where the fault of the separation lies. There is nothing in the evidence, or even in the answer of the defendant himself, seriously to impeach the character or habits of the petitioner as a proper guardian for her children. The burthen of proof is on the defendant, and he has utterly failed, nay, he has not attempted to establish the fact upon which his denial of the petitioner's right depends. He claims, by his answer, that he is entitled to the custody of his children, and that he has never forfeited his right to the same, whereas the statute declares that the mother is entitled to their custody, and the only question is whether she has forfeited her right. The answer is consequently a defence of his own supposed

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right rather than an impeachment of that of his wife. The fact is doubtless accounted for by the circumstance suggested on the argument, that at the time of the preparation of the answer the existence of the statute was unknown to the defendant or his counsel.

If the statute is valid, it is clear that the court is bound to order the children to be delivered to the custody of the mother.

It is argued that the statute is unconstitutional, being in violation of the vested rights of the husband. The statute does not impair the obligation of any contract, and is not unconstitutional on that ground. Nor is it suggested that there is any other clause of the constitution with which it conflicts. But it is urged that it is in violation of the fundamental principles of government, an infringement of the rights of private property, for the protection of which government was instituted, and is therefore void.

The argument proceeds on the assumption that the parent has the same right of property in the child that he has in his horse, or that the master has in his slave, and that the transfer of the custody of the child from the father to the mother is an invasion of the father's right of property. The father has no such right. He has no property whatever in his children. The law imposes upon him, for the good of society and for the welfare of the child, certain specified duties. By the laws of nature and of society he owes the child protection, maintenance, and education. In return for the discharge of those duties, and to aid in their performance, the law confers on the father a qualified right to the services of the child. But of what value, as a matter of property, are the services of a child under seven years of age? But whatever may be their value, the domestic relations and the relative rights of parent and child are all under the control and regulation of municipal laws. They may and must declare how far the rights and control of the parent shall extend over

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the child, how they shall be exercised, and where they shall terminate. They have determined at what age the right of the parent to the services of the child shall cease and what shall be an emancipation from his control.

COLEMBUS C. ROCKWELL and wife vs. JAMES R. MORGAN
and others.

An order for maintenance *pendente lite* will not be made in behalf of a widow on her bill for dower.
On general principles alimony or maintenance is not allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband.

H. V. Speer and Attorney General, for petitioners.

P. D. Vroom, for defendants.

THE CHANCELLOR. On the 30th of August, 1858, the complainant filed her bill in this court to recover her dower in the lands whereof her husband, Charles Morgan, died seized. The defendants are the children of Charles Morgan, and the devisees under his will of the lands in question. The widow has nothing under the will of her husband. She is entitled only to her estate in dower. She claims dower in the whole of his land. This claim is not disputed. As to a part of the land, she claims that in equity she is entitled to the ownership. But if this claim is not sustained she asks dower in these lands also. The bill of complaint was filed on the 30th of August, 1858. She now, by her petition, asks that the rents of a part of the real estate may be paid to her *pendente lite*, or that such other allowance or provision may be made *pendente lite* out of the rents and profits of the said real estate as shall seem meet and proper.

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When this application was presented it seemed to me to be eminently just. The husband died seized of a large real estate—he left his wife nothing but her dower. A part of this land was purchased with her own property. Her title to dower is undisputed. Her children are in the enjoyment of the property. She is without the means of livelihood. Her husband has been dead several years. Her claim is still pending undecided in this court. She asks that a portion of the rents of an estate admitted to be hers should be paid to her for her support *pendente lite*. It seems difficult to conceive of a case which presents a stronger claim to the favorable consideration of a court of equity.

And yet I have been unable to discover any principle upon which the relief asked for can be granted, nor have I found any case which supports the application. It is simply a request for maintenance out of the property in question during the progress of the controversy. The claim clearly does not fall within the equitable principle which allows to a wife a maintenance during the progress of a suit against her husband. The personal property of the wife is in the husband's hands and under his control during coverture. The wife is presumed to be entitled to support until it is shown that her claim is forfeited. In a controversy with her husband it is just that she should have the means of enforcing her claim or of testing its validity. But the doweress is not under coverture. The claim is not against her husband, nor even against his estate. She is attempting to enforce a claim to a legal estate against lands devised to her children. If the claim were against the purchasers of the land from the husband, it would scarcely be pretended that the tenant could be compelled out of the proceeds of the land to contribute to the support of the doweress pending the • controversy. But what stronger claim has she in equity against her husband's children than she would have against a stranger. She clearly has no claim in this court

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to alimony or maintenance from the children. I know of no case in which this claim is allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband, except in the case specially provided by our statute. *Nix. Dig.* 206, § 10.

Such seems to have been the view heretofore taken of this question in this court. *Miller v. Miller, Saxton*, 389; *Yule v. Yule*, 2 *Stockton* 138.

In the case of *Turrell v. Turrell*, 2 *Johns. C. R.* 391, where the wife filed a bill against her husband charging that he was attempting to get possession of a legacy left her by her father, the court permitted her to receive the interest of the note during the controversy. But this allowance was made under the authority of a statute. The claim, moreover, was against the husband himself. I lay no stress upon the circumstance, that in this case the doweress is married, and that the suit is brought by the husband and wife jointly.

The motion is denied with costs.

ENOCH CRAFT and others vs. THE EXECUTORS OF ENOCH SNOOK.

When the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him without any limitation as to continuance, the principal will be regarded as bequeathed also.

Isaac W. Lanning, for complainants.

THE CHANCELLOR. The bill in this case is filed to obtain a judicial construction of the will of Enoch Snook, late of the county of Mercer, deceased.

The testator, among other legacies and provisions of

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his will, gives and bequeaths as follows, *viz.* "I give and bequeath unto my sister, Elizabeth Craft, the interest upon the sum of one thousand dollars, to be paid to her annually during her life; and after her decease the interest to be equally divided between Enoch Craft and Mahlon Craft." "In case there shall be anything remaining over and above paying the legacies above mentioned and bequeathed, then I order the same to be placed at interest, and the interest thereof annually to be divided between Enoch Craft, Mahlon Craft, Samuel Craft, Alexander Snook, Emley Snook, Eden Snook, Peter Johnston Snook, and Peter Hunt." The will contains no disposition of the principal of the \$1000 legacy or of the residue, nor is there any limitation of the time during which the interest is to be paid. Elizabeth Craft, the sister of the testator, received the interest upon the sum of \$1000, according to the directions of the will, during her life. She died leaving Enoch Craft and Mahlon Craft surviving. The legatees, as well of the *interest* of the specific legacy as of the residue, now claim that they are entitled to the *principal* sum of which the interest is thus bequeathed to them.

The general principle has been long and well settled that when the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed also. *Elton v. Sheppard*, 1 *Brown's C. C.* 532; *Philipps v. Chamberlaine*, 4 *Vesey* 51; *Page v. Leap- ingwell*, 18 *Vesey* 463; *Stretch v. Watkins*, 1 *Madd.* 253; *Clough v. Wynne*, 2 *Madd.* 188; *Adamson v. Armitage*, 19 *Vesey* 416; *Earl v. Grim*, 1 *Johns. Ch. R.* 494; 2 *Williams on Ex'rs* (3d Am. ed.) 1027.

There is nothing on the face of the will in question to indicate a different intention. On the contrary, unless this construction be adopted, the testator died intestate as to the bulk of his property. He bequeathed not the principal, but the interest money, of a large portion of his estate. Such obviously was not his intention.

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The legatees of the interest of the \$1000 legacy and of the residue are entitled to receive the principal of the legacies respectively.

The executors are entitled to their costs, as they have merely sought, for their security, to have the construction of the will settled.

If the parties agree as to the amount now due upon the respective legacies there is no need of a reference, otherwise let it be referred to a master to take an account.

JOSEPH L. SMALLWOOD and others vs. ROBERT LEWIN and others.

After the testimony has been closed, and the cause regularly set down for final hearing, the court will not permit a supplementary answer to be put in, unless the delay is satisfactorily accounted for.

It should appear that the matter of the supplementary answer is new, or a sufficient reason given for not having it in the original answer.

The mortgage sought to be foreclosed was given to secure part of the consideration on the purchase of the mortgaged premises. The title to a part of the premises failed. The complainants were not the vendors of the premises nor the original mortgagees. They held the mortgage by assignment, executed prior to the sale of the premises by the original mortgagor to the defendant. Under these circumstances, the fact that the title made by the mortgagor to the defendant, the present owner, was defective, can in no wise affect the rights of a *bona fide* mortgagee under a mortgage executed prior to the conveyance.

This was a motion for leave to file supplementary answer.

B. Williamson, of counsel with complainants, opposed motion.

THE CHANCELLOR. The complainants filed a foreclosure bill against Lewin, the mortgagor, and Thomas V. Johnson and Sarah F., his wife, the said Sarah being the

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owner of the premises in fee subject to the complainants' mortgage. Johnson and wife, having answered the complainants' bill, now ask leave to file a supplemental answer.

There are substantial objections to the application.

The cause was put at issue by filing the replication on the 17th of December, 1858. The rule to close testimony expired on the 6th of February, 1859. The complainants' evidence had been taken, and the cause set down for final hearing at the present term. Upon the cause being moved, the defendants ask leave to file their supplemental answer.

The application is too late, no grounds being suggested as a justification for the delay. Two months have elapsed since the reopening of the court, and ample time was afforded for making the application before the cause was set down for final hearing. In *Macdougall v. Purrier*, 4 Russ. 486, an application for leave to file a supplemental answer after the cause had been set down for hearing was denied with costs.

There is no proof before the court that the matter is new, nor any reason given for not having it in the original answer. This is always required. 2 *Daniels' Chanc. Pr.* 915.

A more substantial objection is, that the defendants are not in a position to avail themselves of the matter proposed to be set up by way of defence.

The matter proposed to be inserted in the answer is, that the mortgage sought to be foreclosed was given as a part of the consideration on the purchase of the mortgaged premises, and that the title to a part of the premises has failed. The complainants were not the vendors of the premises nor the original mortgagees. They hold the mortgage by assignment executed prior to the purchase of the premises by Mrs. Johnson. She purchased from Lewin, her codefendant, the original mortgagor. The fact, that the title made by Lewin to her is defective, can in no wise affect the rights of a *bona fide* mortgagee under a mortgage executed prior to the conveyance.

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It is true that, in the answer originally filed by Johnson and wife, they allege that the mortgage is in fact held by the complainants for the benefit of the mortgagor, but no proof whatever has been produced in support of the answer; and in the absence of such proof the new matter proposed to be introduced by the supplemental answer is irrelevant and immaterial. The rule for closing testimony and the time for taking proof in support of the original answer has expired. No application has been made to enlarge the time. The fair presumption is that there is no proof in the defendant's possession to support the allegation that the complainants are acting for the benefit of or in collusion with Lewin.

Whatever merits there may be in the proposed defence, there is nothing before the court to justify the belief that there is a substantial defence or to warrant the court in acting upon that assumption.

The answer proposed to be filed, though purporting to be by Johnston and wife, is sworn to by Johnson alone. This is clearly irregular. The answer originally filed is verified in the same way. But the oath may be waived by the complainant, and their filing a replication is evidence of such waiver. *The Fulton Bank v. Beach*, 2 Paige 307.

But the complainants object to the supplemental answer as not being properly verified; and if there were no more substantial objections, this alone would exclude the answer, in its present form, from the files of the court.

The motion is denied with costs.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1860.

SOLOMON MATLACK *vs.* SAMUEL JAMES.

Partnership property must first be applied to the payment of the partnership debts. The individual creditors are entitled only to share the net residue after the debts of the partnership are satisfied.

Real estate, although the title stands in the names of the individuals composing the firm, if purchased with the money and for the uses of the firm, belongs to the partnership, and is liable in the first place to the partnership debts.

One partner cannot convey to a creditor of his own, so as to give him a preference over the creditors of the firm, his undivided interest in the real estate belonging to the firm, although the title to such property stands in the individual names of the partners—such grantee having notice of the equitable rights of the firm in the premises.

Voorhees and Browning, for assignees.

Carpenter and Halsted, contra.

THE CHANCELLOR. In the year 1855, Samuel James, James B. Cox, Jacob Iszard, and Ira Iszard, partners under the name of James Iszard & Co., were engaged in the manufacture of glass, at Milford, in the county of Bur-

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On the 29th of August, 1855, for the purpose of giving to the creditors of the firm an equal distribution of their property and effects, they executed to Joseph Matlack and Aaron N. Haines an assignment of all the real estate whereof they, as partners in trade, were seized and titled to, and also of all the personal estate belonging to the partners, in trust, to be distributed among the creditors of the firm in proportion to their respective debts, pursuant to the directions of the "act to secure to creditors an equal and just division of the estates of debtors by convey to assignees for the benefit of creditors."

On the 25th of August, 1855, (four days before the execution of the deed of assignment) Jacob Iszard and Ira Iszard, two of the partners, by deed of bargain and sale executed for the consideration therein expressed, of the premises, conveyed to their father, Joseph Iszard, their father, being the one equal undivided half part of the real estate known as the Milford Glass Factory, being the premises specified in the inventory annexed to the deed of assignment as a part of the partnership property. The validity of the conveyance is contested by the creditors.

The Iszards held title to this land in their individual names, not in the name of the partnership; but it is clear, from the evidence, that it constituted in fact a portion of the capital of the partnership. The firm was originally composed of James Cox and Whitman. The property was conveyed to them in their individual names, but was not paid for by the funds advanced for the purposes of the partnership. On the fourteenth of October, 1854, Jacob Iszard was admitted into the firm as an equal partner with the three others, they conveying to him one-fourth of the real estate, he paying the one-fourth of the stated value of the partnership property. On the 3d of January, 1855, Thomas Whitman, one of the four partners, sold out his interest in the concern to Ira Iszard. On the 1st of that date, for the consideration of \$1300, being

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the amount which Whitman had put into the firm, he conveyed the equal fourth part of the real estate to Ira Iszard. On the same day, Ira Iszard received from the other partners a certificate that he had put into the Milford Glass Factory firm thirteen hundred dollars, for which sum he was acknowledged as the one-fourth owner of said Milford Glass Works, with the appurtenances. It is conceded that he paid but one sum of \$1300, and that the amount which he paid Whitman for his interest in the partnership constituted him an equal partner and the owner of the one-fourth of the real estate belonging to the partners. The evidence leaves no room for doubt that the real estate was in fact partnership property, purchased virtually with partnership funds, and used for partnership purposes, though standing in the name of the individual partners. It was held by the partners as tenants in common in trust for the partnership.

Joseph Iszard, to whom the half of the property was conveyed, previous to the assignment had notice of the equitable claim of the partnership upon the property. The money which his sons put into the firm was in fact advanced by him and his wife. In repayment for the moneys thus advanced the deed was executed. He knew that his sons were partners in the concern; that the money was advanced for the very purpose of their going into business as partners, and that they had advanced no other money for the purchase of the land. When, therefore, the sons proposed to convey to him their respective fourth parts of the glass-house property, he must have known that it was their interest in the real estate as partners in the company, and not their individual property. It is in evidence, too, that the certificate given by the firm to Ira Iszard, upon his purchase of the interest of Whitman, that he was a partner in the concern, and entitled to an equal fourth part of the glass works property, was handed by the father to one of the partners to be signed. There is surely enough to charge the father with

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knowledge of the equitable claim of the partnership and the creditors of the partnership at the time he accepted the title from his sons.

If no assignment had been made by the partners upon deficiency of assets to pay the debts of the firm, Joseph Izard would be regarded in equity as a trustee of this land for the benefit of the creditors of the partnership.

The partnership property must first be applied to the payment of the partnership debts. The individual creditors are entitled only to share the net residue after the debts of the partnership are satisfied.

It is clear, therefore, that Joseph Izard cannot hold his property against the creditors of the partnership, and that he will not be permitted in equity to receive any part of the proceeds of the sale until the claims of the creditors are satisfied.

Regarding the case as now before the court upon a new application by Joseph Izard for the surplus money arising from the proceeds of the sale under the mortgage, the application must be denied.

Regarding it as a hearing upon cross-bill and answer, in pursuance of the suggestion of the late Chancellor and in accordance with the agreement of counsel, I am of opinion that the deed to Joseph Izard should be held void as against the title of the assignees.

The order will be made without costs.

1. Because I am not satisfied of the existence of any actual fraud or intention to defraud in the execution of the conveyance to Joseph Izard. These young men, the sons of the grantee, entered this partnership ignorant of its affairs, and if not totally bankrupt when they entered it soon proved a total wreck through no fault of theirs. Their management was in other hands. The whole money advanced by them was advanced by their parents, and it is natural that they should attempt to protect their interests. The deed I am willing to believe was executed without any fraudulent design, but with an honest purpose,

Gaskill v. Sine.

though clearly under a mistaken apprehension of their rights.

2. The course pursued by the assignees in the prosecution of their claim has neither been ingenuous nor consistent with fair dealing.

JOB H. GASKILL vs. ALLEN W. SINE and others.

If no replication has been filed the facts stated in the answer must be taken as true on the hearing.

A decree rendered against the complainant was opened upon, it appearing that the cause had been submitted to the court by the counsel of the complainant under the misapprehension that an answer to the replication had been filed.

Had the counsel upon both sides acted under the same misapprehension and the evidence in the cause been taken, the filing of the replication would have been regarded as a mere form, and would have been permitted at the hearing as a matter of course.

Wilson, for complainant.

Attorney General, contra.

THE CHANCELLOR. To a bill of foreclosure, the defendant, by his answer, set up two distinct defences, one of which was that the complainant, who was the assignee of the mortgage, acted as the mere agent or trustee of the mortgagee in procuring the assignment, and that the consideration paid for the assignment was the money of the mortgagee. No replication having been filed to the answer, the Chancellor held, in accordance with the well settled rule of practice, that the facts thus set up as a defence must be taken as true, and on this ground dismissed the complainant's bill.

The opinion was delivered on the 2d of February, 1859, and on the next day the final decree was signed and filed. On the fourth of the same month, upon the petition of the complainant's counsel, an order was made upon the defendants to show cause, on the first day of the next term, why the decree should not be opened, and the com-

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complainant have leave to file his replication and produce his proofs. On the fifth of February the court was closed by reason of a vacancy in the office of Chancellor. The cause is now brought to hearing upon the petition and proofs.

There has been no *laches* on the part of the complainant in seeking to open the decree. The application was made immediately after the filing of the decree. The case must now be heard and decided as of the term when the rule to show cause was taken. The complainant is not responsible for the subsequent delay.

The affidavit of the complainant himself, of his solicitor and counsel, have all been taken. From the evidence it is manifest that the case was conducted and argued on the part of the complainant under the impression that a replication had been filed. The complainant swears that the fact set up by the answer as a defence, and from the state of the pleadings assumed by the Chancellor as true without evidence, was not true in point of fact; that he was prepared with evidence to disprove the allegation, had any proof been offered in its support, and that he abstained from offering the evidence solely because he was advised by his counsel that such evidence was unnecessary on his part as long as the allegation of the defendant was unsupported by proof.

The solicitor and counsel of the complainant testify that the cause was conducted and argued with the understanding and belief, upon their part, that a replication had been filed, and on that ground they deemed any evidence on the part of the complainant unnecessary. A natural reason for the mistake is found in the fact that the solicitor who prepared the cause for argument was substituted, long after the answer was filed, in the stead of the original solicitor in the cause, who was removed by death, and that the cause was several years pending before the evidence was taken.

The case presented is that the complainant has lost his

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cause not because the right of the case is against him, but from a misapprehension, on the part of his counsel, as to the true state of the pleadings.

Had the counsel upon both sides acted under the same misapprehension, and the evidence in the cause been taken, the filing of the replication would have been regarded as a matter of form, and would have been permitted at the hearing *nunc pro tunc* as a matter of course. *Milf. Plead.* (ed. 1816) 261; *Mosely* 296, *Rodney v. Hare*; *Cooper's Eq. Pl.* 331; *Smith v. West*, 3 *Johns. Ch. R.* 363; 1 *Smith's Ch. Pr.* 336; *Pierce v. West's ex'rs*, 1 *Peters' C. R.* 351; *Scott v. Jackson's ex'rs*, 1 *Bibb* 277; *Demarr v. Driskill*, 3 *Black.* 115; 2 *Daniel's Ch. Pr.* 966, note; 971; *Wyatt's Pr. Reg.* 376; 1 *Newland's Chan. Pr.* 253; 1 *Eq. Cas. Ab.* 43; *Donegall v. Warr*, *Abridg. of Cas. in Eq.*, C. 7 F., § 4.

The only doubt as to the propriety of opening the decree arises from the fact, that the attention of the counsel of the complainant was called to the want of the replication on the argument. The counsel of the defendant then claimed a decree upon that ground, and in strictness the complainant should then and there have applied to leave to file his replication.

Had the defendants' counsel, with a full knowledge that no replication had been filed, proceeded with the argument, and thus speculated upon the opinion of the court, I should have no hesitation in denying the motion. But neither the complainant nor the solicitor were present at the hearing, and the counsel acted upon the conviction that the replication had in fact been filed. Under such circumstances, it would be too strict to deprive the complainant of an opportunity of proving his case through the mere misapprehension of counsel. I am confirmed in this view of the case from the fact, that the Chancellor, immediately after pronouncing his opinion and signing the decree, granted the rule to show cause. Had the conduct of the cause by counsel upon the hearing been

Newark Lime and Cement Co. v. Morrison.

such as to charge the party with gross *laches* in not then applying for leave to file the replication, the rule to show cause would not have been granted.

The motion to set aside the decree having been made at the same term in which the decree was signed, and before enrolment, there can be no objection on that ground.

The rule to show cause is made absolute. The decree must be opened, and the defendant permitted to file his replication upon the payment of all costs incident to the final hearing and decree. Each party to pay his own costs upon the rule to show cause.

THE NEWARK LIME AND CEMENT COMPANY vs. CHARLES
D. MORRISON and others.

~~A~~ mechanic's lien under the statute takes priority upon the *building* over a prior mortgage upon the *land*.

~~B~~ut the supplement of 16th March, 1859, which creates a lien for *repairs*, makes it subject to any mortgage prior to the filing of the lien.

~~I~~n this case the premises ordered to be sold entire, and relative value of building and land ascertained.

Ranney, for complainant.

Keasby, for lien creditors.

Frelinghuysen, for second mortgagee.

THE CHANCELLOR. The only question in the cause is a question of priority between the mortgagees and claimants under liens filed by mechanics and material men. The premises consist of a lot on Washington street, in the city of Newark, 30 feet 9 inches front, with an average depth of about 267 feet, upon which there was erected a brick building, 30 feet 6 inches front, by 50 feet deep,

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and four stories high. The mortgages, it is admitted, were all given and recorded, and constituted valid subsisting encumbrances on the lot prior to and at the time of the erection of the building.

To secure the payment of debts incurred in the erection of the building, liens were filed by mechanics and material men under the provisions of the statute. By virtue of judgments recovered upon the said claim, and executions issued thereon, the premises were sold to the lienholders, on the 24th of April, 1860, and were conveyed to them, on the 27th of the same month, by deed duly executed. It is not perceived that the sale and conveyance by the sheriff can at all affect the question of priority. The purchasers took, by virtue of the sale and conveyance, precisely the interest which the lienholders had before the sale under the statute. The simple question is, what is the nature and extent of the encumbrance which the statute gives to the lienholder upon the building? Does the lien upon the building take priority over a prior mortgage upon the land?

So far as relates to the encumbrance upon the land there is no controversy. It is admitted that the lien created by the statute does not and cannot interfere with the prior encumbrance created by the mortgage upon the land on which the building is erected. The numerous authorities cited upon the argument sustain this position—a position so clear as scarcely to require an authority in its support. It is equally clear upon the principles of the common law, and independent of any statutory provision, that any building or improvement erected upon the land subsequent to the execution of the mortgage became a part of the land and subject to the existing encumbrance. And it may be safely affirmed that the mortgagee could not be deprived of the benefit and advantage of the incidental benefit derived from a subsequent improvement except by clear and express legislative provision. In a case of doubt his acknowledged common law right would prevail.

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But it cannot be affirmed that the mortgagee has any vested rights in any building or improvement not erected at the date of the mortgage, or that a lien which gives to the party whose labor is employed or materials expended in the erection of such building trenches upon any vested right of the mortgagee or infringes any constitutional provision. The wisdom or policy of such an enactment is a matter exclusively for legislative consideration.

Does the statute, then, give to the lienholder a precedence of encumbrance upon the building over the prior mortgagee upon the premises? The first section of the act declares that the debt shall be a lien on the building and on the land. The eleventh section declares that when the building and lot are sold by virtue of the lien the deed shall convey to the purchaser the building *free from any former encumbrance on the lands*; and shall convey the estate in said lands which said owner had at or any time after the commencement of the building within one year before the filing such claim in the clerk's office, subject to all prior encumbrances "and free from all encumbrances or estates created by or obtained against such owner afterwards, and from all estates created by deed or mortgage made by such owner, or any claiming under him, and not recorded or registered in the office of the clerk of the county at the commencement of said building." This section clearly declares, as it was designed to do, the order of priority of the encumbrance of the lien. Upon the building itself it takes priority of any former encumbrance on the lands—upon the lands, it is subject to the lien of all prior encumbrances recorded or registered at the commencement of the building.

This construction of the statute was adopted by Chancellor Williamson, in *Whitenack v. Noe*, 3 *Stockt.* 321, 413, and was subsequently applied in other cases.

The supplement to the general act, which was approved on the 16th of March, 1859, and which creates a lien in favor of work done and materials furnished for *repairing*

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buildings, makes the encumbrance of the lien subject to any mortgage prior to the filing of the lien. There is a very obvious reason for the distinction made between the lien for the building and a lien for repairs of the building.

The mortgagees in this case claim that there was a building upon the premises at the date of the mortgage, which was removed to make way for the new building upon which the liens attach, and to the value of which it is insisted they are entitled. As the lienholders assent to this claim, it will be allowed, as a matter of agreement, without expressing any opinion whatever upon the validity of the claim. The mortgage premises must be sold entire, and the relative value of the building and land ascertained in the mode adopted in *Whitenack v. Noe*, or in such other mode as may be agreed on by the parties.

THOMAS J. PEER and others vs. JOSEPH COOKEROW.

After decree, if the defendant or his representative have an interest in the further prosecution of the suit, the suit may be revived at his instance. A defendant having a beneficial interest may exhibit a bill of revivor for the purpose of appealing from decree.

The mere fact that three years have elapsed since the signing of decree cannot be set up on demurrer to the bill of revivor.

The objection arising from lapse of time is a mere matter of limitation, which must be pleaded, even though the objection appear upon the record.

B. Williamson, for demurrant.

Attorney General, contra.

THE CHANCELLOR. The complainant in the original suit having died after decree, and her interest in the subject matter of the suit being vested in her devisee,

the defendants in the original bill have filed a bill, in the nature of a bill of revivor, to revive the suit in favor of the devisee. To this bill there is a general demurrer for want of equity.

It appears upon the face of the bill of revivor that the sole design of reviving the suit is that an appeal may be taken from the decree. But if the parties have the right of appeal, and if the revival of the decree is necessary for the purpose of appeal, they must have the right to revive the suit. The complainants in the bill of revivor are the parties aggrieved by the decree, and have therefore the right of appeal. *Nix. Dig.* 98, § 80.

After a decree the defendants, as well as the plaintiffs, are entitled to a bill of revivor; and although originally the right appears to have been restricted to those cases in which the defendant had, or was supposed to have, a beneficial interest in the decree, yet it is now well settled that if the defendant or his representative have an interest in the further prosecution of the suit the suit may be revived at his instance. 1 *Mitford's Pl.*, by *Jeremy* 79, and note *q*; *Lord Stowell v. Cole*, 2 *Vern.* 219, (*Raithby's ed.*, note 1); *Horwood v. Schmedes*, 12 *Vcsey* 311.

"The good sense is when the defendant can derive a benefit from the further proceeding he may revive, unless there is a general rule against it." *Williams v. Cooke*, 10 *Ves.* 406.

A defendant's right of appeal cannot be defeated by the complainant's death after the decree. He has the same interest to revive after the decree that the complainant had before, viz. the maintenance of his just rights. It was at one time deemed necessary, where the suit abated after the appeal was taken, to revive the suit in the court below; the practice now is for the appellate tribunal to make the order. 1 *Daniel's Ch. Pr.* 1648.

It is urged that the time for appealing has expired, and therefore the parties can derive no benefit from further proceeding. But this does not appear upon the record, and

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therefore is not the subject matter of demurrer. Besides, if the demurrant could avail himself of mere matter *in pais*, the parties aggrieved by the appeal may have been infants, feme covert, or insane. The mere fact, therefore, that three years have elapsed since the signing of the decree does not warrant the conclusion that the right of appeal is gone. The objection, moreover, arising from lapse of time is a mere matter of limitation, which must be pleaded, even though the objection appear upon record. A writ of error will not be quashed upon motion, even though it appear to have been brought more than twenty years after judgment. 2 *Strange* 837, 1055; 1 *Archb. Prac.* 209.

The objection raised upon the argument for want of proper parties cannot prevail. The parties to the original decree who are not made parties to the present suit have no real interest in the controversy. A bill of revivor merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree and to be the objects of its operations. *Story's Eq. Pl.* § 376; *Cooper's Eq. Pl.* 71.

The demurrer is overruled.

COX et ux. vs. CORKENDALL.

When legacies are directed to be paid out of the *estate* of the testator, ~~the~~ the real estate is charged with the legacies.

So when the lands are devised to the executors, who are directed to ~~pay~~ pay the legacies.

The general rule, that a legacy bears interest from the time it is payable ~~to~~ admits of an exception where a legacy given by a parent to a minor child is made payable at a future day, and no provision is made for ~~the~~ the support of the legatee in the meantime.

Interest not allowed under the language of the will in question and ~~the~~ the circumstances of the case.

Cox v. Corkendall.

McCarter, for complainants.

Shepherd, for defendant.

THE CHANCELLOR. Jonathan Corkendall, of the county of Sussex, by his last will and testament, bearing date on the first day of August, 1828, gave, devised, and bequeathed as follows: "I give and bequeath to my beloved wife Mary a good and comfortable living during her natural lifetime out of my estate. Next, I give and bequeath to my daughter Susan \$400, and to my daughters Lydia Ann and Maria, each, the sum of two hundred dollars, which several bequests are to be paid after the death of their mother. Also, I give and bequeath to my two daughters, Lydia Ann and Maria, each, one good cow and one good feather bed and bedding, and six sheep, to be paid to them when called for." "All of which several legacies are to be paid out of my estate."

"And lastly, I give all my lands and personal property, after my debts are paid, to my two sons, Levi and Moses, to be equally divided between them: and furthermore, I make, constitute, and appoint my two sons, Levi and Moses, executors of this my last will and testament."

This bill is filed by Lydia Ann, a daughter of the testator and one of the legatees named in the will, and her husband, Jephtha Cox, against the devisees named in the will, to have the legacies declared a charge upon the real estate, and to recover the amount thereof and the value of the specific legacies with interest.

Upon the main question made by the bill there can be no dispute. The testator directs the legacies to be paid out of his estate. He gives his estate, real and personal, after the payment of debts, to his two sons, and appoints them his executors. The legacies are a charge upon the land, and must be so declared. Where legacies are directed to be paid out of the estate of the testator the real estate is charged with the legacies. *Lepet v. Carter*, 1

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Ves., sen., 499; *Harris v. Fly*, 7 *Paige* 421; *Van Wink Van Houten*, 2 *Green's Ch. R.* 172; 2 *Jarman on Wills* :

So where the land is devised to executors who are directed to pay the legacies.

The only question open to dispute is the amount the legatee is entitled to recover. The will is dated the 1st of August, 1828, and the testator died on the 1st of that month. The legacy of \$200 was payable on death of the mother. The specific bequest, *viz.* one c a good feather bed and bedding, and six sheep, are to be paid when called for." The widow died on the 1st of July, 1854, (twenty-six years after the death of the testator) at which time the pecuniary legacy, by its terms made payable. On the 27th of June, 1857, the complainants made a written demand of the defendants for pecuniary legacy, with interest, and also for the delivery of the specific bequests.

The complainants claim interest on the pecuniary legacy from the death of the father, on the ground that the legatee was a minor at the death of the testator.

The general rule, that a legacy bears interest from the time it is payable, admits of an exception where a legacy given by a parent to a minor child is made payable at a future day, and no provision is made for the support of the legatee in the meantime. In such case, as the parent is bound for the support of the child, and as the presumption is that it was not the intention of the testator to leave the child unprovided for, equity presumes that the intention was that the legacy should draw interest from his death, and the same rule of construction is adopted by law. *Heath v. Perry*, 3 *Atkyns* 101; *Harvey v. Harvey*, 1 *P. Wms.* 21; 2 *Roper on Leg.* 1257.

In all the early cases in equity it will be found that the same rule of construction was adopted upon a bill filed to maintain a provision for an infant child out of the estate of the parent until he was of age. And the allowance is made by way of maintenance, and the court allow legal interest or less as they deem equitable.

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All this seems to rest upon the equity of the case rather than upon any clearly defined or fairly presumed intent of the testator.

In *Heath v. Perry*, 3 *Atkyns* 101, the bill was filed to recover interest upon legacies which were payable, by the terms of the will, when the legatees were twenty-one. Lord Chancellor Hardwick said, "cases of this kind, how far a legatee, who is not entitled to the payment of his legacy immediately, shall have interest in the meantime, depend upon particular circumstances—some upon relationship, some upon the necessities of the legatees, and most of them upon the particular framing of wills—and there is hardly one case that can be cited that is a precedent for another.

In the case now under consideration it appears that the testator, at the date of his will and at the time of his death, was the owner of a small farm, upon which he resided with the families of his two sons, both of whom were married. His personal estate was insufficient to pay his debts. After the testator's death, the mother, with her two unmarried daughters, continued with the sons upon the farm. The daughters, as in their father's lifetime, continued to work for their support, sometimes from home and sometimes at home, where they were employed in sewing or weaving. There is, as there always in such cases will be, great conflict in the evidence as to the comparative value of their labor and the services they rendered in their brother's family. But the material fact in the case is clearly established, that for years after the father's death, and down to the time of her marriage, the legatee had a home with her mother in her brother's family, and there, however humble may have been that home and however laborious her life may have been, she was trained to habits of industry. She enjoyed the counsels and society of her mother, the companionship and protection of her brother, the nameless and inestimable privileges of a home surrounded by her family, advan-

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tages far greater than could possibly have been purchased by the interest to be derived from a legacy small as the present or far greater in amount.

Upon the face of the will it is apparent that the testator never intended that interest should be paid upon the legacy before the death of the mother. He expected precisely what occurred, viz. that the daughter would find a home, so long as it was needed, with her mother upon the homestead. That the specific legacies should be paid whenever the daughter was in a situation to require them, and that the money legacy should be received without interest on the mother's death.

It will be observed that the complainants are not here asking for a maintenance during her minority in the shape of interest upon the legacies. She comes, after the lapse of a quarter of a century, a married woman with her husband, asking the payment of the legacy given by her father with more than thirty years' interest. The claim has no support either in the intentions of the testator or in the principles of equity. The complainant is entitled to the legacy, with interest from the death of the testator's widow.

The evidence in regard to the specific bequests is far from satisfactory, resulting mainly from lapse of time. The legatee came of age, according to her own evidence, in 1830. She was married in 1860. She is, with her husband, litigating in equity with her brother for a few personal chattels of trifling value. The whole claim might properly be discarded as a stale demand; but as the defence is not rested upon this ground, I shall allow the value of the sheep from the time of the written demand. The evidence shows that the cow and bed and bedding have been delivered.

Wilson v. Hill.

HARRIS WILSON vs. JOSIAH HILL and CATHARINE his wife
and FRANCES WATTS.

The question is well settled at common law that the cancellation of a deed by consent of parties will not divest the grantee, and revest in the grantor an estate which has once vested.

The title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be cancelled, and a conveyance made by her grantor to her husband.

The testimony of a married woman, illegally elicited before a grand jury on a charge of bigamy against her husband, is not admissible against her on a question of property.

Can a grand jurymen, being a witness in a suit respecting property, disclose the secrets of the grand jury room? *Query.*

A *feme covert* was seized of certain lands. She being ill, consented, at the solicitation of her husband, to the cancellation of her deed and to a conveyance from her grantor to her husband. During her lifetime her husband married a second wife. Being imprisoned on charge of bigamy, he and his mistress reconveyed the lands to his wife, she and her husband executing a mortgage for the benefit of the husband to a third party; this mortgage was afterwards assigned to complainant, who was a lawyer, the counsel of the husband, and had knowledge that the property had been held by the husband in trust, and that the mortgage was also held in trust for the husband—it was held that the complainant had sufficient knowledge to put him on inquiry; that he was not a *bona fide* holder, and that the mortgage was void in his hands.

Zabriskie, for complainant.

Gilchrist, for defendants.

THE CHANCELLOR. This bill is filed to foreclose a mortgage purporting to be given by Josiah Wilson and Catharine his wife to Peter Bentley, and by him assigned to the complainant. Frances Watts is made a defendant, as the owner of the equity of redemption.

The execution of the bond and mortgage are duly proved. They respectively bear date on the 26th of December, 1854, and are given to secure the payment of \$1500. The mortgage is recorded upon the same day.

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On the same 26th of December a deed was executed by Josiah Hill and Catharine his wife to Frances Watts, acknowledged on the 27th, and recorded on the 28th of that month. The deed contains this clause, *viz.* "subject to the operation of two mortgages on the said premises—one for \$600, and the other for \$1500—which the said Frances Watts hereby covenants and agrees with the said Josiah Hill to pay off, with the interest on the same, having retained a sufficient sum to pay the same out of the consideration money."

The scrivener swears that the clause was inserted in pursuance of the agreement between the parties. This, upon the face of the papers and upon the complainant's evidence, makes a very plain case for the mortgagee.

But the defendant, styled in the bill Frances Watts, has filed an answer, in which she alleges that she now is, and at the date of these instruments was the lawful wife of Josiah Hill; that they were married at the Sailor's Bethel in Boston, by Elder Rand, in the year 1839; that he was at that time a congregationalist minister; that they lived together as man and wife for fourteen years, and down to within a short period of the execution of these papers, when her husband married a servant girl in his family, named Catharine, who united with Hill in the deed and mortgage already referred to as his wife. She further states that the property in dispute was her separate property, purchased and paid for partly by money which she had at the time of her marriage and partly by the accumulations of her industry while the wife of Hill; that the deed for the property was originally executed to her in her name, but that the title was obtained from her during a period of severe illness, and a new deed taken from the original grantor in the name of her husband; that the deed was made to her husband because it was expected that she would then die, and that on her recovery her husband promised to reconvey it; that but \$25 was due when the mortgage was given, and that in

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the only amount which in equity can be recovered upon it. This answer raises a number of important issues, both of law and of fact. The first and most important of these questions, which lies at the foundation of the whole inquiry, is—was the defendant Frances the wife of Josiah Hill, as alleged in the answer.

The fact of the marriage is not proved, either by record or by the testimony of any witness present at the ceremony. But it is proved, by numerous and unimpeached witnesses, that the parties lived together, cohabiting as and reputed to be man and wife, for many years previous to the date of this transaction; that during such cohabitation she had two children, which were recognised by the husband as his; that in the year 1847, while Hill and Frances were so living together, a deed was executed to her for a tract of land in the county of Somerset, upon which they subsequently resided. That deed contains the following clause: "which said tract or parcel of land is conveyed to the said Frances Hill, wife of Josiah, and to her heirs and assigns for ever, the farm having been purchased by her with her own separate funds."

Hill subsequently united in the conveyance of this property with Frances as his wife, representing it as Mrs. Hill's property. He joined with her as his wife repeatedly in the conveyance of property, the title to which was in himself. He united with her as his wife in the acknowledgment of these instruments. The cohabitation between the parties and their repeated formal recognitions of the marital relation continued till nearly the date of the mortgage in controversy. This furnishes competent and plenary evidence of the fact of the marriage.

But it is urged that this evidence is met and overcome by counter testimony, viz. her own oath to the contrary and her acceptance of the deed from Hill and Catharine his wife.

These instruments, as well the bond and mortgage of the complainant as the deed to Frances Hill, the defend-

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ant, by the name of Frances Watts, were coterminously executed while the parties were all in confinement in the common jail of the county of Hudson. Hill was in confinement on a charge of bigamy for marrying Catharine, his pretended wife. Frances, the first wife, was brought by compulsory process before the grand jury to testify against her husband, and was sworn to testify upon that charge. According to the testimony of one of the grand jurors, being so sworn, she testified that she was never married to Hill; that she was not his wife; that the connection between them was a partnership. On that occasion she passed by and answered to the name of Frances Watts. The complaint, the juror adds, was unanimously dismissed upon her testimony solely.

Waiving all discussion of the long agitated question whether a grand juror should ever be permitted, upon a mere question of property, to violate privileged communications by disclosing the secrets of the grand jury room; assuming for the present, what I do not admit, that such evidence may be lawful, I think it clear that the evidence here offered is not admissible, and if admissible it is entitled to no weight whatever.

The change of deeds vested neither the legal nor the equitable title in the husband. He had neither when the mortgage in question was executed.

So the title remained until December, 1856, when the husband was arrested and imprisoned on a charge of bigamy for marrying Catharine, a second wife, while his wife Frances was living. While the husband and both the females were in jail, a creditor, having a charge of \$25 against Hill, desired the counsel of Hill to have it in some way secured. The scrivener and counsel of Hill thereupon visited the jail. A bargain, it is alleged, was made between the husband and wife to divide the property. The husband and his mistress first executed a mortgage upon the wife's property to the creditor for \$1500, to secure \$25, and then humanely conveyed the

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wife's land to her subject to that mortgage. The wife is thereupon dragged illegally before the grand jury, and swears that she was never married. The bill of indictment is ignored and the husband discharged.

It would prove an interesting and instructive, though perhaps painful task, to enter that prison, to lift the curtain that conceals this transaction, and to disclose the means and influences that were used to bring about this result.

The wife was most unlawfully and improperly brought before the grand jury, and compelled to testify upon a criminal charge against her husband. There is no clearer principle of law than that a wife will not be permitted to testify against her husband on a charge of bigamy, even by the husband's consent. 2 *Starkie's Ev.* 399; *Gregg's case*, *Sir T. Raymond* 1; *Roscoe's Cr. Ev.* 114.

She is not permitted to testify for or against him—not for him on account of the strong influence and temptation she is under to pervert the truth in his favor, nor against him from fear of creating dissension. The evidence is excluded, and in my judgment most wisely excluded, upon principles of public policy.

No bill of indictment could lawfully have been found upon her testimony, nor if found would she have been admitted as a witness. The bill was dismissed not as the grand juror supposes upon *her* evidence, but simply because the state failed to prove what they were bound to prove affirmatively by competent evidence, to wit, the husband's marriage. The evidence is incompetent for or against the husband, and equally incompetent to affect favorably or unfavorably the rights of property of the wife. It cannot be that evidence thus unlawfully extorted from the wife for an unlawful purpose can be used to strip her of her rights of property.

But if the evidence could even be supported as competent it should be disregarded as of no weight. She was

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called to consign her husband to infamy and imprisonment. The first prompting of her heart, if stung by jealousy and incited by resentment, would be to sacrifice him to her passions, or if she testified under the resistless incentive of a woman's love, it would be to sacrifice herself for his sake.

The fact that a deed was executed to her which appears never to have been in her possession is of no weight. We must regard the fact as established for all the purposes of this cause, that at the date of these papers the defendant Frances was the lawful wife of Josiah Hill, the complainant.

As a consequence, it results that the alleged contract made between them, in the jail or elsewhere, in regard to her property was null and void as against her.

As another consequence of this fact, she is clearly entitled to her rights in the mortgaged premises as doweress unaffected by this mortgage.

But she does not rest her rights upon this ground. She claims the property as her own, and insists that this mortgage is fraudulent, null, and void. Let us see how far the evidence sustains her answer upon this point. On the 27th of April, 1853, the mortgaged premises were conveyed by Bernart Heatley and wife, by deed duly executed and acknowledged, to Frances Hill, the wife of Josiah Hill. It was so stated in the deed. The deed contained the usual covenants of seizin for quiet enjoyment against encumbrances and of general warranty in favor of the wife. That deed was made upon an exchange of property between the parties. In performance of the exchange, the parties entered into possession—Heatley of the property at Rockaway conveyed by Hill and wife to him, Hill and wife of the property at Jersey City received in exchange. The deed remained in possession of the scrivener, who was the counsel of Hill, till the month of September. Hill then called upon his counsel, stated that his wife was very sick, not expected to live—(they then

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lived together as man and wife). She had a bad and unruly boy, and did not want him to have the property. He wished the deed to his wife destroyed, and a new deed drawn from Heatley to *himself*. The counsel declined, unless by the wife's consent. He said she would consent, and he was very anxious to have it closed that night. At Hill's instance, counsel immediately drew the deed—went to Hill's house—found the wife in bed very low, not expected to live: and on being interrogated by counsel in the presence of the husband, she *consented* or *requested* that the deed to herself should be destroyed, and a new deed made to Hill. The counsel thereupon took the cars for Rockaway—roused Heatley's family from bed—surrendered the deed previously given to Mrs. Hill—had a new deed executed to Josiah Hill, and returned the same night to Jersey City. The Heatleys were told that Mrs. Hill was not expected to live, and that she requested or consented to the change. The deed, though executed and acknowledged on the 9th of September, was antedated to correspond with the date of the original deed to Mrs. Hill. On the 3d of October the deed was placed on record, and thus, without a private examination or an acknowledgment before an officer—without a dollar's consideration—the property of a wife in the last stage of debility and disease, upon a consent extracted at the husband's instance by the husband's counsel and in the husband's presence, is attempted to be transferred to the husband. There is strong reason, from the evidence, to believe that this property was paid for by the wife, and was in equity her sole and exclusive property. But that is totally immaterial—it is enough to know that the title was in her, and the presumption is that it was hers in equity, as well as at law, till the contrary is proved.

The legal title to these premises was vested in Mrs. Hill in April, 1853. The title, and possession under it, had been in her for six months at the time of the execu-

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tion of the new deed. Did the cancelling of her deed destroy her title?

The rule of the common law is perfectly well settled, that the cancellation of a deed by consent of parties will not divest the grantee and revest in the grantor an estate which has once vested. There must be a reconveyance. *Leech v. Lecch*, 2 *Chan. Rep.* 100; *Touchst.* 70, *Roe v. Archbishop of York*; 6 *East*; 86 *Harrison v. Owen*, 1 *Atk.* 520; *Jackson v. Chase*, 2 *Johns. R.* 87; *Cheseman v. Whittemore*, 23 *Pick.* 231; *Raynor v. Wilson*, 6 *Hill* 469; *Lewis v. Payn*, 8 *Cowen* 75; *Holbrook v. Tirrell*, 9 *Pick.* 105; *Viner's Ab., Fail's* x 2; *Miller v. Mayncaring*, *Cro. Car.* 399.

It is said, by the witness, that the mortgage was given for the husband's benefit. That is certainly a remarkable transaction. A bargain is made between the husband and wife to divide her property between them. A mortgage is given by the husband and his mistress upon his wife's property, in consideration, it would seem, of his letting his wife have the residue of the property, and perhaps take upon herself the guilt of rescuing her husband from an impending prosecution. In the hands of the original mortgagee, who was acquainted with the facts, the mortgage is worthless as against the wife's interest. He in fact disclaims all connection or participation in the matter. The paper was held for months in the hands of counsel for the husband's benefit.

On the 9th of June, 1854, it was assigned by the mortgagee, at the instance of the husband, to the present complainant, a counsellor at law of the city of New York. He insists that he is a *bona fide* holder for value; that he purchased the mortgage of the husband without notice of the wife's equity.

The legal principle is admitted, that although the mortgage was illegal and void in the hands of the original mortgagee, either for himself or as trustee for the benefit of the husband, both having full notice of the wife's equity, yet a purchaser without notice may enforce the claim.

Updike v. Titus.

But I do not think the complainant can stand in that position. He had been the counsel of Hill before; a large amount of his claim is for fees; he knew the parties; he knew that Mrs. Hill had her property in trust; he knew that this mortgage was in the hands of a third party in trust for the husband. He was bound to have ascertained the nature and character of the trust. There was enough to have put him on inquiry. If he did not know, he was bound to know what the real character of the transaction was.

UPDIKE vs. TITUS and others.

The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, or other relatives.

The rule is well settled, that a mere moral obligation constitutes no legal consideration for a contract.

A widow and her son were living together; the former performed certain services, such as washing and ironing, &c., the latter contributed somewhat to the support of the family. The mother lent to the son, from time to time, small sums of money. The son, having become embarrassed, executed a mortgage to his mother, the consideration being the services and the loans aforesaid.

Held, that, as against creditors, the loans constituted a valid consideration — contra as to the services.

Edward W. Scudder, for complainant.

Beasley, for defendants.

THE CHANCELLOR. The bill is filed to foreclose a mortgage given by Charles G. Upkike to his mother, Elizabeth Updike, for \$1200. The execution of the mortgage is fully proved, but its validity is contested by a judgment creditor of the mortgagor, and the purchaser of the equity of redemption in the mortgaged premises, as without

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consideration, fraudulent and void as against creditors. The consideration of the mortgage, as shown by the evidence of the mortgagee and mortgagor, (both of whom have been examined) was money lent and services rendered by the mortgagee to the mortgagor.

The money was advanced in small sums, extending, during a period of several years, from 1847 till 1854. The services also extended through a period of over eight years, and consisted of keeping house, washing, ironing, mending, and other similar domestic labor.

From the evidence, it appears that the husband of the complainant died in March, 1846, leaving a small property and a family of children, of whom the mortgagor was one. By his will, he left two houses and a lot of ground in the city of Trenton, with the bulk of his personal property, to a daughter and son in law, and in consideration thereof directed that they should take care of and provide for his wife Elizabeth a comfortable home and living while she remained his widow. Two of the testator's daughters were also to have a home in the house while they remained single. The family continued to occupy the house after the death of the testator. The son in law, to some extent, provided for the family until 1854, when he removed. In 1855, the house was sold under execution, and purchased by the mortgagee, part of the family, with the mortgagor and his mother, still continuing in the house. The mortgagee continued a member of the family from the time of his father's death, when he was of age, till the date of the mortgage, with the exception of a year, when he was in California. No account had been kept of these loans or services—no contract had been entered into for their performance, and no promise made for their payment.

In 1857, the complainant, being largely in debt and fearing trouble from his creditors, proposed to execute the mortgage to his mother, to secure her claims in preference to those of other creditors, which was accordingly done.

So far as relates to the claim for services rendered, the mortgage is without consideration and fraudulent as against creditors. The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grand parents, brother, step children, or other relations. No action can be maintained for such services in the absence of an express contract or engagement to pay for them. The rule rests upon the simple reason, that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. Ordinarily, for a service rendered, the law implies a promise to pay corresponding with the value of the service; but for services rendered by members of a family to each other no promise is implied for remuneration, because they were not performed in the expectation, by either party, that pecuniary compensation would be made or demanded. The authorities upon this subject are numerous and decided, and the principle upon which they rest too clear for doubt.

The services rendered in such cases are mutual, and it may be often difficult to decide upon which party the principal benefit is conferred. In this case, during a part of the period for which these services are claimed, the son owned the house in which the mother lived, and not only furnished her a home, but made the principal provision for the family.

I think it perfectly manifest, from the testimony of the complainant herself, that no remuneration for her services was contemplated when they were rendered or thought of by her until the son proposed to give her the mortgage. Compensation would neither have been demanded or tendered but for the embarrassments of the son. There was clearly no legal liability for their payment; and if it should be admitted that the son was morally bound to pay for the service (which is by no means clear) the rule is well settled that a moral obligation constitutes no legal consideration for a contract. The rights of the creditors,

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therefore, are not altered by the voluntary obligation to pay for the services. As to them, the case stands as if no mortgage had been given. *Chitty on Con.* 45, and cases cited in note; *Beaumont v. Reeve*, 8 *Queen's Bench* 483; *Hack v. Stewart*, 8 *Barr.* 213; *Cook v. Bradley*, 7 *Conn.* 57; *Mills v. Wyman*, 3 *Pick.* 207.

The claim for money advanced rests upon a somewhat different ground. Undoubtedly the advance of money by a parent to a child may be, and perhaps usually is presumed to be a gift, and not a loan. *Chitty on Contracts*.

But that presumption is by no means conclusive, and is open to be rebutted by the situation and circumstances of the parties. In this case, I think, the grounds for deeming it a loan are quite as strong as those for holding it as a gift. The mother was advanced in years, infirm, and possessed of very small means; the son in the prime of life, in active business, and more capable of taking care of her money than the mother. It was natural, under the circumstances, for her to trust him with her funds, though, perhaps, with not a very firm hope of repayment. The son, moreover, swears that the advance was made as a loan. I shall so regard it. This constitutes a good consideration for the mortgage, though barred by the statute of limitations at the time of its execution. *Beaumont v. Reeve*, 8 *Queen's Bench* 487, *per Lord Denman*; *Cook v. Bradley*, 7 *Conn.* 57; *Chitty on Con.* 45, note 2.

The complainant is entitled to a decree for the amount of money advanced to the son with interest.

 BARRICLO vs. THE TRENTON MUTUAL LIFE AND FIRE INSURANCE COMPANY.

Matters which are known to complainant before the decree in the original suit will not support a supplemental bill; nor will matters which have arisen since, if they are merely cumulative evidence of the charges in the original bill.

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That a supplemental bill is filed without authority of the court is not matter of demurrer, though it may on that ground, in the discretion of the court, be dismissed.

The supplemental bill in this case held to be multifarious.

William Halsted, for complainant.

Beasley, for defendants.

THE CHANCELLOR. The original bill in this cause was filed on the 11th of May, 1852, against the Trenton Mutual Life and Fire Insurance Company. The only parties defendants to the bill were the company, its president and treasurer. The proceeding was instituted under the act to prevent frauds by incorporated companies. The bill was filed by a creditor and stockholder of the company, and prayed, among other things, that the company might be declared insolvent, that they might be restrained by injunction from exercising their corporate franchises, and that a receiver might be appointed to wind up its concerns. Upon an application for an injunction, at May term, 1852, the Chancellor held, that upon the case made by the pleadings and proofs the insolvency of the company was not established, and the motion for an injunction was denied. The grounds of that opinion appear in the report of the case in 1 *Stockton* 95.

On the 15th of July, 1852, the complainants filed an amended bill. It prayed (1) that a full discovery may be made of the business transactions and property of the company, including its guarantee capital; (2) that the creditors may be paid what was justly due, and the policy holders protected in their just rights; (3) that the company and its officers may be enjoined from collecting the debts or exercising the franchises of the corporation; (4) that a receiver may be appointed, and that the property and funds of the company may be brought into court, and disposed of under the order of the court; (5) and that the books of the company may be brought into court for in-

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spection and examination in proof of the charges of the bill.

At May term, on the 18th of July, 1853, the cause having been brought to hearing upon the pleadings and proofs, the Chancellor declared his opinion that the company was insolvent, but declined to appoint a receiver. The management was left in the hands of the directors of the company, who were required, in closing its affairs, to act under the immediate control and direction of the court. The same duties were imposed upon them as are required of receivers under the 11th section of the act referred to. See 1 *Stockton* 347.

By a decretal order, made on the 18th of June, 1853, the company was declared insolvent under the provisions of the statute, and were required to make and exhibit to the court an inventory of all their property and of the debts due to and from the company, and to make report of their proceedings to the court every six months thereafter.

The supplemental bill, after reciting the charges and prayer of the amended bill, gives, by way of supplement, a detailed history of various steps in the progress of the cause since the 18th of July, 1853. It exhibits statements, made from time to time by the directors, of the affairs of the company. It gives a detailed statement, from the report of the directors, of the amount of the guaranteed capital of the persons by whom it is held, and the amounts held by them respectively, of the amounts of interest paid thereon, of the securities given for this capital, and of the withdrawal of certain securities, and the substitution of others, from time to time made in lieu thereof. It states that admitted claims against the company had been purchased up by the directors and others associated with them as joint purchasers of such claims, and that, under a report of one of the masters of the court, it was held by the master that such claims should be held only for the amount paid therefor, and that, in the distribution of the assets of the company, they should have only a *pro rata* dividend on such amount.

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Various charges of fraudulent conduct are made against the directors, and it is alleged, in general terms, that facts which have come to light, and information received since the filing of the original bill, make it apparent that the company was insolvent prior to the filing of the original bill, and that the fact was known to the directors.

It charges that a part of the guarantee capital had been illegally assigned by the directors to themselves and others, and insists that the directors and others by whom such guarantee capital was deposited should be estopped from denying that it constitutes a part of the assets of the company for the payment of losses. It insists that the contributors to the guarantee capital ought to be personally charged with the amount of such guaranty, even if a recovery upon the security itself is barred.

The bill prays—(1) that the company may be enjoined from collecting any of its debts or from exercising any of its franchises; (2) that a receiver may be appointed to collect and take into possession all the debts and property belonging to the corporation at the time of their suspending business; (3) that the directors of the company, by whose authority or consent the securities deposited with the treasurer of the company as guarantee capital was given up, be decreed to replace the same, or to be personally liable for the amounts so withdrawn, and that the other defendants may be decreed to replace the securities by them withdrawn from the hands of the treasurer of the company under authority or pretence of a resolution passed at a meeting of the company in April, 1851, or may be decreed to be personally liable for the amount thereof by them respectively received, with interest, and that they may be decreed to repay to the company the amounts respectively received by them as interest upon such guarantee capital; that the guarantee capital may be decreed to be assets, and liable to be assessed for its *pro rata* share of the debts and losses of the company, and that the bonds and securities substituted by order of the

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Chancellor, in lieu of the securities originally given as a capital, be in like manner appropriated and distributed under the decree of the court.

The bill is essentially vicious both in its frame and design. It is in no sense a supplemental bill nor a bill in the nature of a supplemental bill. It is not in aid of the original bill. It seeks a different object; it introduces new parties; it reports new facts, charges, and specifications having no connection with the purpose of the original bill.

The design of the original bill was to have the insurance company declared insolvent, a receiver appointed, and its affairs wound up under the direction of the court. Relief was sought against the corporation alone at the hands of its creditors.

The sole design of the present bill is to establish the claims of the corporation against persons alleged to be its debtors or against its officers who have made themselves liable by their fraudulent conduct. Its sole design is to have the guarantee capital declared to be assets for the payment of the debts of the company; to have the directors who parted with the securities constituting such guarantee capital, and the parties who received them from the treasurer liable therefor, and also liable for such interest as they may have respectively received upon such guarantee capital when in the hands of the treasurer. I say this is the sole design of the supplemental bill, for it is manifest that the prayer for an injunction and receiver has been or may be fully attained under the original bill without the least reference to the supplemental matter.

In this light the bill is in no sense supplemental, but is a new bill for a new purpose against new parties; or if the bill, by reason of its formal prayer, may be deemed to include as well the purpose of the original bill as the additional purpose of securing the guarantee capital and interest thereon, the bill is bad for multifariousness.

It is a manifest attempt to unite with a bill by a credit

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or of an insolvent company for the settlement of its affairs under the provisions of the statute the settlement of disputed claims between the company and its officers, members, and debtors. Such discordant and dissimilar claims cannot be united in one suit.

The matters, moreover, which are introduced into the bill as supplemental are and were known to the complainant before the making of the decree in the original cause, or if they have arisen since, they are merely cumulative evidence in support of charges in the original bill, neither of which constitute proper matter of a supplemental bill. *Story's Eq. Pl.* § 328, § 332, § 337; *Mitford's Pl. by Jeremy* 61.

There are other matters in the bill which render it demurrable, but it is unnecessary to advert to them.

The objection that the bill was filed without the authority of the court is not matter of demurrer, though the bill upon that ground may, in the discretion of the court, be dismissed. *Eager v. Price*, 2 *Paige* 333; 1 *Hoffman's Ch. Prac.* 403; *Pedrick v. White*, 1 *Metcalf* 76.

The demurrer is sustained, and the bill dismissed.

I have arrived at this conclusion with the less reluctance because it is obvious that no possible advantage can accrue to the creditor from prosecuting the claim under this bill. Every possible advantage within the legitimate scope of the original bill can be more readily attained without the aid of the supplement. Every other object sought by the supplement can be more readily attained in another mode. This suit has already been pending nine years, and but little progress has been made towards the satisfactory adjustment of the rights of the creditors. This new bill, in the shape in which it is presented, would be the signal for more protracted controversy.

It is but just to all the parties that this controversy should be promptly closed, and I am disposed to afford all the aid in the power of the court to promote that end. The main question attempted to be raised by this bill, to

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wit, the validity of the guarantee capital in the hands of the company, has already been decided in this court. In *The Trenton Mutual Life and Fire Insurance Co. v. McKelway and others*, 1 *Beasley* 133, the late Chancellor, in an elaborate opinion, pronounced the contract upon which the securities were advanced to constitute the guarantee capital against public policy illegal and void. That suit was instituted for the foreclosure of one of the mortgages given as a part of the guaranty. I must assume, as the directors were acting as receivers under the authority of the court, that the suit was instituted under the sanction of the Chancellor for the express purpose of testing the question. In this view I should, sitting here, feel myself bound by it, and so far as this case is concerned, the question should be considered as at rest. The bill, however, was dismissed without prejudice to the claim of the complainants for interest advanced to McKelway upon the contract.

By an order in the cause, made on the 3d of December 1858, the Chancellor, while denying an application for an attachment against the contributors to the guarantee capital for not paying the interest, gave leave to counsel to institute such suit as he might be advised against the contributors to recover the interest. That question is therefore an open one, which should be at once disposed of. It was intimated, upon the argument, that the decision upon the validity of the guarantee capital in the suit against McKelway was not satisfactory, and that counsel desired the question to be reviewed. If so, it should be done not in this court but in the Court of Appeals. No appeal was taken from the decree in favor of McKelway.

If the directors fail to take prompt steps to have the question regarding the claim for interest and any other question in the way of a settlement finally adjudicated, will entertain an application for the appointment of a receiver.

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If the securities advanced as the guarantee capital belong to the company they should be collected and applied to the payment of its policies. If the contract is void, as has been decided by the Chancellor, the securities should be returned to their owners, and not kept locked in the vaults of this court.

The interest of a parties demand all prompt adjustment of this controversy.

RICHARD HUNT, a lunatic, and SAMUEL H. HUNT, his guardian, *vs.* THOMAS P. HUNT.

An inquisition of lunacy is not conclusive evidence on the question of incapacity.

The evidence in this case held to establish the fact, that the grantee was incapable, from mental incapacity, to make the deed in question.

Held, also, that the conveyance would have been set aside on the further ground of undue influence exercised by the grantee and his family over the grantor. a man of weak mind, the consideration of the deed also being inadequate.

McCarter, for complainant.

Linn, for defendant.

THE CHANCELLOR. This bill is filed to set aside a deed made by Richard Hunt, now a lunatic under guardianship, to his brother Thomas P. Hunt, the defendant. The only question before the court is whether, at the time of the execution of the deed, the defendant was so far deprived of his reason as to be incapable of contracting.

The evidence in the case, which is exceedingly voluminous, satisfactorily establishes the following facts: The land in question, in the year 1822, was assigned by commissioners on partition to Richard Hunt, as a part of his father's estate. He was then of full age. In that year he

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was taken to the lunatic asylum at Bloomingdale, where he remained under treatment as a lunatic for some months and was then discharged and returned home in company with his brother, but not restored to his right mind. The answer admits that for seven years after he continued insane, though with lucid intervals. From that time he has virtually been under the charge and care of his brothers; his land has been rented by them without consent, and at times, as the evidence shows, against will. He has taken no intelligent interest in or control over it; he has never been assessed or paid taxes for land, or had the control or management of it; he has been regarded and treated by his own family and others as of unsound mind; he has never attended election or voted; he has never been to church or ordinary places of public resort and assemblage; he has never attended the funeral of a brother or sister or other near relative; he has threatened his mother with personal violence, and has heaped upon her the most opprobrious epithets; he has uttered the most senseless and shocking blasphemies; he has treated female members of his family with indecency and insult; he has, on great variety of occasions, by his language and his conduct shown that he was laboring under great mental delusion, at other times under extreme mental excitement without any provoking or adequate cause.

In 1858, a commission of lunacy issued out of the court at the instance of his relatives. An inquisition was taken on the fifth of March, of that year, by which it was found, upon the unanimous concurrence of fifteen jurors, his neighbors and acquaintances, that at the time of taking the inquisition the said Richard Hunt was a lunatic of unsound mind, not capable of the government of himself, his land or lands, and that he had been in the same state of lunacy for the space of thirty years or upwards. That inquisition has not been traversed, and upon its finding Richard Hunt is now under guardianship as a lunatic.

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The evidence of the inquisition is by no means conclusive of the question of incapacity. *Sergeson v. Sealey*, 2 Atk. § 412; *Stock on Lunacy* 27; *Whiteknack v. Stryker*, 1 *Green's Ch. R.* 6.

But under the circumstances of this case it is entitled to very respectful consideration.

It would be unprofitable to discuss the evidence. I have adverted only to some of its more prominent points, omitting many facts of equal or greater significance. There is nothing, in my judgment, in the evidence on the part of the defendant to overcome or materially to weaken the case made on the part of the complainant. The evidence satisfactorily shows that at the time of the conveyance from Richard Hunt to the defendant he was incompetent, by reason of mental incapacity, to make a binding contract for the conveyance of his land, and on that account the deed should be set aside.

The case is too free from doubt to render the intervention of a jury necessary or expedient. There is another ground which renders a reference to a jury undesirable. If the case upon the ground already stated admitted in my mind of any doubt, I should, nevertheless, feel constrained to set aside this deed upon another ground established by the evidence, viz. for the reason that the grantor was of weak mind; that at the time of the conveyance, and for a long time previous, he was a member of the family of the brother to whom the conveyance was made, an inmate of his family, dependent upon him for his daily comforts, to some extent under his control, and in a situation to be influenced and controlled by him; that the evidence shows that undue influences by the grantee or by members of his family were used to operate upon the hopes and fears of the grantor; that the circumstances attending the execution of the contract were such as to justify the belief that it was not understandingly made, and that it was made upon a very inadequate consideration.

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If, therefore, I have entirely misapprehended the force and conclusiveness of the evidence upon the first ground, the complainant would, nevertheless, be entitled to relief in equity against the contract.

The complainant is entitled to relief. But the deed will be set aside upon equitable terms. All the moneys advanced by the defendant as a consideration for the conveyance must be refunded, and all debts justly due from the grantee to the defendant, which were discharged or released as a part consideration, must be paid, and the obligation entered into by the grantee cancelled and given up. There must be a reference to a master to take an account.

WILLIAM SMITH vs. SHADRACH SMITH and others.

The testator directed his real and personal estate to be divided into fourteen equal parts, and devised and bequeathed one fourteenth part to his son James, disposing of the residue among his other children. By a subsequent clause in his will, the testator ordered that from the value of the estate devised and bequeathed to his children, his executors should deduct, respectively, the amount of "money heretofore paid and advanced to or for either of my said children, or to either of the husbands of my said daughters, and all other moneys and accounts in which they may be severally indebted to me at the time of my decease."

At the time of testator's death James was indebted to him.

James' share in the land devised under the will was claimed by virtue of an assignment which he had made, and also by force of a sheriff's sale under a judgment.

Held, that the claim of the executors to deduct the debts due the estate from James' share of the proceeds of lands sold under proceedings in partition was paramount to the rights acquired by the assignment or the sheriff's sale.

Hamilton, for the applicant.

Linn, for the heirs.

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THE CHANCELLOR. Upon a bill for partition among the devisees of Nathan Smith, late of the county of Sussex, deceased, the land, not being susceptible of partition, was sold, in order that the proceeds might be divided under the direction of the court. The share of James Smith, one of the devisees, is claimed by William Smith, by virtue of an assignment to him from James, and an order in his favor for the payment of the money. He also claims under a sale and conveyance by virtue of a judgment and execution against James, made by the sheriff of the county of Sussex prior to the master's sale under the proceedings in partition. This claim is resisted on behalf of the other devisees under the will.

The interest of James Smith in the land and in the proceeds of the sale, whatever it may be by virtue of the sheriff's deed and of the assignment, is vested in William. The only question is, what estate, if any, in the land had James under the will of his father.

The testator directed his real and personal estate to be divided into fourteen equal parts. He devised and bequeathed to his executors five equal fourteenth parts in trust for five of his children, and one equal fourteenth part to each of his other children, including James.

By a subsequent clause in the will, the testator ordered and directed as follows, *viz.* "It is my will, and I hereby order and direct, that from the value of the share of my said estate devised and bequeathed in trust for my five children first above named, and also from the value of each of the shares of my said estate herein devised and bequeathed to my other children, my said executors deduct, respectively, the amount of money which I have heretofore paid and advanced, or may hereafter pay and advance to or for either of my said children, or to either of the husbands of my said daughters, and all other moneys and accounts in which they may be severally indebted to me at the time of my decease."

At the time of the testator's death his son James was

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indebted to him in a large amount. His share of the personal estate was retained by the executors, and divided among the other children of the testator, but not in an amount sufficient to equalize the shares under the will. A large balance was still due, for which the executor held a judgment against him.

The provisions of the will are too clear to admit of doubt. The testator unquestionably intended that his entire estate, real and personal, should be equally divided among all his children—language cannot make it plainer. The two clauses of the will are to be taken in connection and so read as to make one harmonious provision. He did not intend to devise one equal fourteenth of his land absolutely to each child—no matter what might be the amount of his or her indebtedness, and leave his estate to the hazard of recovering back the surplus—any more than he intended to vest absolutely in each legatee a right to one fourteenth of the personal estate. What the testator intended, and what the will effects is, to give to each legatee and devisee an equal fourteenth of the entire estate charged with the payment of his debts. The design is accomplished by including the debt of each child in the aggregate of the estate, and giving each child a share of the gross amount, less his individual indebtedness. To object that the title is in the heir, and that the executors are not empowered by the testator to sell the land or effect an equal division, is dealing with the shadow and not with the substance. It is the duty of the executors to see that the intention of the testator is carried into effect, and that each child receives his equal share according to the provisions of the will; and if the executors lack the necessary power, this court will aid them in effectuating that purpose. Neither the want of power in the executors nor their mistakes (if any have been committed) in the settlement of the estate, nor even their wilful misconduct, will be permitted to defeat the clear intent of the testator and the legal rights of the devisees.

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The land has been sold; the fund is now in court and under its control; there is no difficulty in carrying out the provisions of the will, and it is the duty of the court to dispose of the fund in accordance with that purpose. This was one of the purposes for which this proceeding was instituted. The bill was filed by William Smith, one of the devisees, and also one of the executors of the will of Nathan Smith. After reciting the provisions of the will, the bill charges that the interest of the devisees requires that a partition be made; but inasmuch as the lands were so circumstanced that a sale thereof would be necessary in order to a fair division of the estate of Nathan Smith between his children *according to the directions of his will*, and as doubts were entertained whether such division could be fairly made, except by the intervention of this court, therefore the aid of the court was invoked. The sale has been made in pursuance of that prayer. The complainant now claims the one fourteenth part of the proceeds of the sale by virtue of an individual judgment of his own against his brother. He certainly can claim no higher or better right under the judgment than the debtor himself had. He took under the will the one fourteenth subject to the payment of his debts to the estate. The proceeds of the sale of James' fourteenth must be applied first to equalize the shares of all the children of the testator, as required by the will, and the surplus, if any, must be paid to the judgment creditors.

There is nothing in the objection that the executors, as such, are not before this court. It is not necessary that they should be to enable the court to direct the disposition of the fund. That is done for the benefit of those interested in the estate who are before the court. It will be the duty of the executors to carry the direction into effect—at any rate this objection does not lie in the mouth of William Smith, who is himself one of the executors, and who is bound to see that the provisions of the will are carried into effect.

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FRANCIS PRICE vs. CHARLES G. SISSON and others.

By force of the statute, a decree directing a conveyance to be made vests the estate, so that the rights of the parties, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter.

The terms of such decree must be construed precisely as the conveyance itself would be.

A conveyance to the grantees and their heirs for the use of the grantees and their heirs, in trust for the persons beneficially interested, does not vest the legal estate in the latter by virtue of the statute for transferring uses into possession.

And where the deed is thus technically drawn the trustees take the legal estate by virtue of the limitation without the aid of any reasoning derived from the nature of the estate.

In construing limitations of trusts courts of equity adopt the rule of law applicable to legal estates.

An estate was conveyed to the grantees in trust to permit the grantor and his family and the father of the grantor, during their lives respectively, to enjoy the estate, and take the rents and profits thereof, and after the death in trust to convey the premises to the son of the grantor and "to such other lawful issue as the grantor may then have living, share and share alike in fee simple, as soon as he or they arrive at age"—held, that the son of grantor had a vested interest, which was not determinable by his death before the happening of the contingency upon which the legal estate was to be conveyed to him, viz. the determination of the intervening life estates. The general rule, as applied to legal estates, is no remainder will be construed to be contingent which may consistently with the intention be deemed vested.

It is the uncertainty of the right of enjoyment which renders the remainder contingent, not the uncertainty of the actual enjoyment.

In a deed, the word "issue" is universally a word of purchase, and whenever the word is made use of as a word of purchase, either in a deed or in a will, it is synonymous and coextensive with the term "descendant."

The case was heard on bill, answer, and proofs.

Bradley and William Pennington, for complainant.

Zabriskie, for defendants.

THE CHANCELLOR. On the 10th of December, 1800, Mindert Garrabrants, jun., intermarried with Effie, the

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ghter of John Van Houten, and on the 29th of September, 1801, had by her issue one son, Mindert Garrabants (3d). On the 10th of August, 1807, he executed John Van Houten, the father, and Helmah Van uten, the brother of his wife, a conveyance in fee ple of all his real estate, including a tract of about 7 acres at Slonger, in trust for certain purposes therein cified.

On the 29th of June, 1808, a bill was filed in this court the grantor in the said deed, Mindert Garrabrants, ., against the grantee and his wife and only child, *et que trusts* therein named, praying that the said deed ght be set aside and made void, as executed by mistake. e trustees answered, admitting that the deed, as exe- ed, was not in all respects in conformity with the eement under which the same was executed. A ree was therefore made, on the 9th of September, 8, declaring the said instrument to be utterly void and io effect, and decreeing that the same should be set le, vacated, and annulled, both at law and in equity. And it was in and by the said decree further ordered, adged, and decreed, that the said Mindert Garrabrants, ., should, on or before the third Tuesday in November n next, execute and deliver to the said John Van uten and Helmah Van Houten a conveyance of the ds described in the deed of the 10th of August, 1807, rust, that the grantees, and the survivor of them and heirs of such survivor, should permit Mindert Garra- nts, jun., and his family, and Mindert Garrabrants, ., the father of Mindert Garrabrants, jun., during their s, respectively, to occupy and possess the messuages l tenements, and the rents, issues, and profits thereof, the support and maintenance of the said Mindert rrabrants, jun., and of his father, Mindert Garrabrants, ., during his life; and upon this further trust, that er the decease of the said Mindert Garrabrants, jun., d of his father, Mindert Garrabrants, sen., that then the

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said trustees and the survivor of them, and the heirs of such survivor, shall convey the whole of the said premises to the said Mindert Garrabrants (3d), son of the said Mindert Garrabrants, jun., and Effie his wife, and to such other lawful issue as he, the said Mindert Garrabrants, jun., may then have living, share and share alike in fee simple, as soon as he or they arrive of age, (reserving to the widow of the said Mindert Garrabrants, jun., if any he should leave, the said widow's legal estate of dower in the said premises).

The conveyance was not executed within the time appointed by the decree; but on the 19th of March, 1809, Mindert Garrabrants, jun., executed a deed for the same premises to the grantees in the former deed upon trusts slightly variant in terms from the language of the decree. The deed contains no recital of a reference to the decree in chancery, but the bill of complaint in this cause charges, and the answer admits, that it was made in compliance and in conformity with the said decree.

Mindert Garrabrants (3d) came of age on the 29th of September, 1822. On the 29th of July, 1825, Mindert Garrabrants (1st), one of the *cestui que trusts* for life, died. In the years 1834, 1835, and 1836, Mindert Garrabrants (3d), by deed of conveyance and sale, with covenants of general warranty, conveyed the tract at Slonger, in separate parcels, to different purchasers. These titles subsequently became united in Francis Price, the present complainant, who claims a fee in the premises from Mindert Garrabrants (3d).

Mindert Garrabrants (2d), the grantor in the deed of trust, and one of the *cestui que trusts* for life under it, survived his son, and died on the 3d of September, 1846. He left no issue other than the two daughters of his son, Mindert Garrabrants (3d).

Mindert Garrabrants (3d) died on the 1st of May, 1837, leaving two daughters, infants of tender years, Mary Elizabeth, who intermarried with Charles G. Sisson, and

Effie, who intermarried with James Van Buskirk, defendants in this suit.

John Van Houten and Helmah Van Houten, the trustees in the deed of trust, both died in the lifetimes of the *cestui que trusts* of the life estates in the lands conveyed on the 17th of May, 1852. John H. Van Houten, only son and heir at law of Helmah Van Houten, the surviving trustee, made a conveyance of the trust property specified in the deed of trust to the two daughters of Mindert Garrabrants (3d), as the only lawful issue of the said Mindert Garrabrants (2d) living at his death.

An action at law having been commenced by them for the recovery of the property at Slonger, the complainants filed their bill in this cause to restrain the defendants from further proceeding at law and for the confirmation of their title.

The main controversy in this cause arises upon the true construction of the trust deed executed by Mindert Garrabrants, jun., under the authority of a decree of this court, bearing date on the 9th of September, 1808.

Both parties claim under that conveyance. The complainant claims under a title derived through Mindert Garrabrants the third, one of the *cestui que trusts*. The defendants, two of the children of Mindert Garrabrants the third, claim the premises, not through their father, but by virtue of a deed executed by the trustee to them as the lawful issue of their grandfather, Mindert Garrabrants the second, pursuant to the provisions of the trust. It will be assumed, for the purpose of the investigation, that the entire estate, legal or equitable, to which Mindert Garrabrants the third was entitled has been legally transferred to and vested in the complainant.

What estate did Mindert Garrabrants (3d) take under that deed or decree?

By the act of June 13th, 1799, § 47, which at the date of the decree was and still is in force, it is enacted, that where a decree of the Court of Chancery shall be made

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for a conveyance, release, or acquittance, and the party against whom the said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformably to such decree. *Paterson's Law*, 433, § 47; *Nixon's Dig.* 94, § 56.

The time limited by the decree for the delivery of the conveyance was the 3d of November, 1808. It was not delivered till the 15th of March, 1809. By force of the statute, therefore, the decree has the same operation and effect as if the conveyance had been executed conformably to the decree. By operation of the decree the title vested before the deed was executed. The rights of the parties, therefore, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter. The bill in this case charges, and the answer admits, that the conveyance was made in compliance and in conformity with the decree. If, however, in the progress of the investigation it shall appear that the deed contains any clause adverse to the title of Mindert Garrabrants (3d) or those claiming under him, his rights cannot thereby be prejudiced. At the time of the conveyance he was an infant, and however the rights of the parties to the conveyance competent to contract might be affected by giving or accepting a conveyance variant from the terms of the decree, it is clear that an infant could not thus be deprived of his rights under the decree.

Again, the terms of the decree must be construed precisely as the conveyance itself would be if executed within the time appointed for its execution. The language of the statute is, that the decree shall be taken to have the same operation and effect, and be as available as if the conveyance had been executed conformably to the decree. The same principles of interpretation, therefore, are to

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d as if the terms of the decree were duly and embodied in the conveyance.

These suggestions in regard to the nature and the investigation, we approach the immediate of our inquiry. What estate did Mindert Garra-

by virtue of the decree? terms of the deed, the legal estate vested in the grantees in trust for the persons beneficially. The trust was not executed by the statute for bringing uses into possession, so as to vest the legal estate in the *cestui que trusts*, or in either of them. The technically drawn for the creation of a trust estate, divested from the legal title. The conveyance is to the grantees and their heirs, for the use of the said and their heirs, in trust for the persons benefited in the grant. This is the precise formula for the creation of a trust. 2 *Bla. Com.* 336, *Christian's*

a use is limited upon a use the statute executes the first use. 2 *Bla. Com.* 336; 1 *Cruise's Dig.* 453, 1, § 1; *Hill on Trustees* 63, 229.

This familiar principle is thus distinctly stated because of the argument it was strongly urged, that inasmuch as the terms of the trust the grantees were not to *pay* the rents and profits to Mindert Garrabrants (1st) and Garrabrants (2d), but to permit them during their respective lives to *occupy and possess* the estate, and to receive the rents and profits thereof, during their respective lives, as executed by the statute, and that they had, by the deed, a legal estate for life. There is a numerous class of cases which hold, that where the donee to uses is permitted the *cestui que use* to take and receive the rents and profits, or to occupy and enjoy the estate, no legal estate is created, but the estate will be vested by the deed in the person who is to receive the rents. But this is the limitation of another general rule, *viz.* that where a donee to uses is intrusted with duties or

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powers, for the due discharge of which it is requisite that he should take the legal estate, the use is not executed, but a trust arises. If, on the other hand, the duties imposed on the trustee are not such as to require that he should take the legal estate the use is executed. *Barke v. Greenwood*, 4 *Mees & W.* 429; *Hill on Trustees* 229, 231, 233, and cases cited in *note g*.

This rule applies where the conveyance is to the trustees to the use of another, but where the conveyance is to the trustees and to the use of the trustees, they take the legal estate by virtue of the limitation without the aid of any reasoning derived from the nature of the trust. *Poussell on Decr. (Jarman)* 220, 221, *note 7*; *Hill on Trustees* 233.

The entire legal estate under the conveyance is unquestionably vested in the immediate grantees, John Van Houten and Helma Van Houten, with limitations of trusts to Mindert Garrabrants (1st) and Mindert Garrabrants (2d) for their respective lives, and then over to Mindert Garrabrants (3d) and the other lawful issue of Mindert Garrabrants (2d).

In construing limitations of trusts, courts of equity adopt the rules of law applicable to legal estates. Declarations of trust, either of real or personal estate, are construed in the same manner as common law conveyances where an estate is finally limited by deed. 4 *Cruis.* 310, *title 32, c. 19, § 65*; 1 *Sanders on Uses and Trusts* 280.

I am of opinion, said Lord Northington in *Wright v. Pearson* (1 *Eden* 125), that a limitation in trust, perfected and declared by a testator, must have the same construction as the devise of an estate executed. The rule, notwithstanding some conflict among the earliest cases, appears to be satisfactorily settled. *Cases Temp., Talbot* 19; *Lord Glenorchy v. Bosville*; *Jones v. Morgan*, 1 *Bro. C.C.* 222; *Garth v. Baldwin*, 2 *Vesey* 655.

Regarding the trusts under the conveyance as executed, and the limitations of the equitable interest as complete and final, so that the limitations of trust are to be con-

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strued by the rules of law applicable to legal estates, let us examine what estate is given to Mindert Garrabrants (3d). The estate is conveyed to the grantees in trust to permit the grantor and his family and the father of the grantor, during their lives, respectively, to enjoy the estate, and take the rents and profits thereof, and after their death in trust, to convey the whole of said premises to Mindert Garrabrants (3d), the son of the grantor, and to such other lawful issue as the grantor may then have living, share and share alike in fee simple, as soon as he or they arrive at age. Divesting the estates of the *cestui que trusts* of their character as trusts, and treating them as pure legal estates, the grant would be to Mindert Garrabrants (1st) and Mindert Garrabrants (2d) an estate for their joint lives and the life of the survivor of them, with remainder to Mindert Garrabrants (3d) and such other lawful issue as Mindert Garrabrants (2d) may then have, as tenants in common in fee simple, share and share alike, to be enjoyed as they severally attain the age of twenty-one years. This is stating the case most strongly in favor of the complainant, and rests on the assumption that, by the conveyances, an equitable estate in remainder is vested in Mindert Garrabrants (3d), which was not liable to be defeated by his death before the determination of the intervening estates for life of his father and grandfather. The defendants maintain that no estate whatever, legal or equitable, by the terms of the grant, vests in Mindert Garrabrants (3d). That the legal estate is wholly in the trustees, and the right to the conveyance of the estate, legal or equitable, in Mindert Garrabrants (3d) is contingent upon his surviving both the tenants for life. I think it clear, however, that under the conveyance Mindert Garrabrants (3d) had an equitable interest, viz. to have the whole estate, legal and equitable, conveyed to him upon the determination of the life estates of his father and grandfather. Construing the limitation of trust by the same principles which govern in the con-

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struction of the legal estates, the interest of Minder-
Garrabrants (3d) is a vested interest, which is not de-
terminable by his death before the happening of the con-
tingency upon which the legal estate is to be conveyed to
him, viz. the determination of the intervening life estates

The rule, as applied to legal estates, is that no remain-
der will be construed to be contingent which may con-
sistently with the intention be deemed vested. Every
remainder man may die without issue before the death
of the tenants for life. It is the present capacity of
taking effect in possession, if the possession would be-
come vacant before the estate limited in remainder de-
termines, that distinguishes a vested from a contingent
remainder. *Fearne on Rem.* 149 (4th ed.); *Kent's Com.* 203.

A remainder, says Chancellor Walworth, is vested in
interest where the person is in being and ascertained
who will, if he lives, have an absolute and immediate
right to the possession of the land upon the ceasing or
failure of all the precedent estates, provided the estate
limited to him by the remainder shall so long continue.
In other words, where the remainder man's rights to an
estate in possession cannot be defeated by third persons
or contingent events, or by the failure of a condition
precedent if he lives, and the estate limited to him by
way of remainder continues till all the precedent estates
are determined, his remainder is vested in interest. *Haw-
ley v. James*, 5 Paige 466.

A remainder is contingent, although the remainde-
man is in being and ascertained, so long as it remain
uncertain whether he will be absolutely entitled to the
estate limited to him in remainder if he lives, and such
estate continues until all the precedent estates have ceased.
Ibid 467.

When the person to whom a remainder after a life
estate is limited is ascertained, and the event upon which
it is to take effect is certain to happen, it is a vested re-
mainder, although by its terms it may be entirely defea-

by the death of such person before the determination of the particular estate. It is the uncertainty of the right of enjoyment which renders a remainder contingent, not the uncertainty of its actual enjoyment. *Williamson v. Field*, 2 Sandf. C. R. 533. See, also, *Moore v. Lyons*, 25 Wend. 144.

The better opinion also is, says Chancellor Kent, that if there be a devise to trustees and their heirs during the minority of a beneficial devisee, and then to him, or upon trust to convey to him, it conveys a vested remainder in fee, and takes effect in possession when the devisee attains twenty-one. If the devisee dies before twenty-one, the estate descends to his heirs as a vested inheritance. 4 *Kent's Com.* 204.

These authorities show that the equitable interest of Mindert Garrabrants (3d) under the conveyance was a vested interest. He was in *esse* at the date of the deed, and his interest vested immediately on its execution and delivery, subject to be divested *pro tanto* upon the birth of afterborn issue. The only afterborn issue of Mindert Garrabrants (2d), the grantor, were the two daughters of his son, Mindert Garrabrants (3d), who are the defendants in this cause. They survived the grantor, and became entitled with their father by the terms of the trust, each to one equal undivided third of the equitable estate. Applying the principles which govern the construction of legal instruments to the terms of this trust such must be the result.

In a deed the term "issue" is universally a word of purchase. *Doe v. Collis*, 4 T. R. 299.

And wherever the term is used as a word of purchase, either in a deed or in a will, it is synonymous and co-extensive with the term "descendants," and includes all persons who answer that description. Such is the legal construction of the term in all cases where its natural meaning is not controlled by a plain intent apparent on the face of the instrument. 2 *Jarman on Wills* 33, 353; 1 *Roper on Leg.* 158; 2 *Williams on Executors* 953; 2 *Spence*

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on *Eq. Jur.* 154; *Leigh v. Norbery*, 13 *Vesey* 340; *Sibley v. Perry*, 7 *Vesey* 531; *Davenport v. Hanbury*, 3 *Vesey* 257; *Freeman v. Parsley*, 3 *Vesey* 421; *Cook v. Cook*, 2 *Vern* 545; *Hampson v. Brandwood*, 1 *Maddock* 381.

The term may be, and often is, especially in wills, construed as meaning children, where such appears to be the intention of the testator. But such intention must be gathered from the instrument itself. This is but an instance of the general principle, that the will is to be construed according to the intent of the testator. The cases on the subject are exceedingly numerous, and with remarkable uniformity they sustain the principle as stated.

It is urged, and with seeming force, that this construction is against reason and probability; that it never could have been intended that the parent and his children should share the estate equally. The objection has often been made, and has always been met by the answer, that the court must give to the terms of an instrument their fair, natural, and ordinary import, unless when controlled by a plain contrary intent. This general principle is not denied. But the court are asked to go back of the decree, and look into the previous proceedings in the cause, to ascertain what was intended by the term "issue," as used in the decree and in the deed. And from these it is insisted that the intention was to exclude from the limitation over the children of Mindert Garrabrants (3d). That this will totally vary the legal effect of the term used in the decree and in the deed is not denied. But it is sought to be justified on the ground, that the estate being created by the decree, and not by the deed, the entire proceedings in the cause may be resorted to for its interpretation. This, I think, is not admissible. By the terms of the statute already adverted to (*Nix. Dig.* 94, § 56,) the decree is to be considered and taken in all courts of law and equity to have the same operation and effect, and be as available, as if the conveyance had been executed conformably to such decree. The decree is to be

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construed as if the deed had been executed pursuant to its terms. The deed and the decree must be alike construed according to the legal effect of the terms used. The same principles of interpretation are to be applied to each. If the deed had been executed conformably to the terms of the decree within the time prescribed, it would not have been admissible to resort to the proceedings in the cause to interpret the deed. Where, moreover, the terms of the decree are clear and unequivocal, independent of the statute, its construction could not be altered by a resort to the pleadings.

It was suggested, rather than urged, upon the argument, that these trusts should be regarded as executory, and as they are to be carried into effect under the control of the court, a greater latitude of interpretation might be adopted. If that course were admissible, and the deed could be interpreted according to the apparent intention of the parties without regard to fixed rules of interpretation, it would become a grave question, whether the death of Mindert Garrabrants (3d) in the lifetime of his father did not altogether defeat his interest in the estate, and whether that was not the real design of the parties in the creation of the trust. But the defendants have invoked in support of their title, and I think rightfully, the principle, that the limitation of trust estates must be construed by the rules of law applicable to legal estates, and the further principle, that the rights of the parties were unchangeably fixed by the terms of the decree. Adopting these principles in support of their claim, the court cannot escape the application of well settled legal principles in dealing with the trust estate.

It has been said that in the interpretation of trusts and marriage settlements the most favorable exposition will be made of words to support the intention of the parties. "It is, however, the intention of the parties appearing on the deed that always govern the court in construction, not the arbitrary conjecture of the judge, though founded

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on the highest degree of probabilities." *Horry v. Horry*, 2 Dess. 126.

Whatever I might deem probable in regard to the intention of the parties, I do not feel authorized to interfere with well settled rules of construction.

The evidence does not support the allegation of mental incapacity in Mindert Garrabrants (3d) to convey his estate by reason of intemperance or from any other cause. Nor is it an appropriate case for the application of the principle upon which a court of equity interferes to protect expectant heirs or reversioners against the disposition of their estates on the ground of constructive fraud. 1 Story's *Eq. Jur.* 339, note 1.

Conceding that the principle might have been applied as against the original purchasers, it cannot operate against a subsequent *bona fide* purchaser without notice of the fraud.

By the terms of the trust, the estate vested equally in Mindert Garrabrants (3d) and his two daughters, the other issue of the grantor. Under the conveyance executed by Mindert Garrabrants (3d) the complainant is entitled in equity to his interest in the estate, being one equal third part thereof. The title to the legal estate, as well as to the remaining two-thirds of the equitable estate, is in the defendants.

The injunction will be retained. It appears, from the evidence, that valuable permanent improvements have been made upon the land by the complainants, which give them a large portion of their value. The complainant is entitled in equity to an allowance for those improvements, so far as they enure to the benefit of the estate of his cotenants. A reference will be necessary to ascertain the character and value of the improvements. Each party will be at liberty to apply for directions as to the terms of such reference.

 Petit v. Chevelier.

ERNEST PETIT vs. IGNACE CHEVELIER.

Using to account, excluding a copartner from an examination of the partnership books, and from a participation in the profits of the business, although breaches of duty, do not, standing alone, call for the interposition of the court by injunction before answer, or an opportunity of hearing.

F. B. Ogden, for complainant.

THE CHANCELLOR. The parties are florists, and in 1828 entered into partnership for the extensive cultivation and sale of flowers and plants. The business of the complainant has been to attend to the cultivation of the plants. The business of the defendant has been to take the flowers and plants to the New York market for sale. The complainant charges that, by reason of the sales, the defendant has been in the habit of receiving large sums of money, and for the payment of numerous bills and expenses, the complainant believes that the defendant now holds in his hands, as the profits of the partnership, about the sum of \$100; that the defendant, since the commencement of the partnership, has pretended to keep an account of the moneys made by him and of the moneys received and expended; that he has always refused to permit the complainant to examine said books, and when requested so to do by complainant has insulted and abused him; that no settlement of the partnership accounts hath ever been made, but the defendant hath refused, though requested to do, to come to a fair settlement or to account to complainant for his share of the profits of the partnership business now in his hands.

The bill prays for a dissolution of the partnership, an account, and for an injunction, and for the appointment of a receiver.

On filing the bill, the complainant asks for a temporary

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injunction to restrain the defendant from collecting or receiving any debt or money due the partnership.

Each partner has an equal right to manage the partnership business and to receive the debts due the firm. By the arrangement between these parties, it was made the special business of the defendant to sell the plants and flowers raised by the firm, and to receive the proceeds of the sales. To restrain the defendant from exercising his lawful calling and from the prosecution of his daily business is a delicate exercise of power, and should be resorted to only in a clear case and upon a pressing emergency. No such exigency is shown by the complainant's bill. There is no charge of insolvency or allegation of danger of irreparable loss. It has no analogy, therefore, to a bill to restrain waste or prevent irreparable mischief. In such case an injunction would not be granted before answer filed without notice to the defendant and an opportunity afforded of putting in an answer. *Read v. Bowers*, 4 Bro. Ch. C. 441; *Lawson v. Morgan*, 1 Price 303; 2 *Eden on Injunctions* 359, note 2.

Refusing to account, excluding the complainant from an examination of the partnership books and from a participation in the profits of the partnership business are violations of duty in a partner affording ground of just complaint, but standing alone they are not sufficient, before answer or without an opportunity afforded to the defendant of being heard, to invoke the exercise of the power of the court by injunction.

The motion for the injunction must be denied.

WILLIAMSON vs. SYKES.

After a decree *pro confesso*, order of reference, and report of master, the decree will be opened, and the defendant let in to answer, if the equity of the case requires such relaxation of the rules of the court.

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Dudley and Beasley, for complainant.

Stratton and Vroom, for defendants.

THE CHANCELLOR. The exception taken to the master's report in this cause is not sustained. There is nothing in the cause to warrant the claim of commissions on the part of the defendant. The bill charges that the whole amount claimed upon the contract is due. No answer has been filed. The bill is taken as confessed. All the claims made by way of set-off were admitted and allowed by the master. So far as the evidence in this case is concerned, the complainant is entitled to have the master's report confirmed and to a final decree.

Since the report was filed George Sykes, the defendant, on the twelfth day of November, 1860, filed his bill of complaint, praying that the contract upon which the original suit by Williamson was founded may be reformed; that a general account may be taken of the dealings and transactions between the parties in interest; that the proceedings in the suit by Williamson may be stayed, and that he may have such relief as he may be entitled to in equity. Aside from all technical questions which may arise as to the character and frame of this bill, and the time of exhibiting it, which it would be irrelevant and improper now to anticipate, the fact material to the present inquiry which it discloses is, that at the time of the contract made by Sykes, which Williamson is now seeking to enforce, there was due from the *cestui que trust* of Williamson to Sykes certain moneys, which by agreement were to be deducted from the amount specified in the contract to be accounted for by Sykes. This fact is verified not only by the statement of the bill but also by the affidavit of the counsel, by whom the contract was drawn and who is the witness of its execution. Assuming the fact thus verified to be true, it seems clear that the report of the master is for a larger sum than Williamson is entitled *ex æquo et bono* to recover, and that in equity

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Sykes is entitled to have an account taken of the amount justly due.

The only question then is, has Sykes, by *laches* on his part, or by misconduct as a trustee, forfeited his right to an investigation of the account and to an allowance of his claims against the estate. Shall he now be admitted to a defence—and if so upon what terms. This renders necessary a recurrence to the leading facts in the history of the controversy, which fortunately are not disputed.

In May, 1824, Anthony S. Earl, of the county of Burlington, died intestate, seized and possessed of considerable personal and real estate. He left surviving a son and a daughter, Mark Anthony Earl and Virginia E. Earl, his heirs at law. In August, 1834, George Sykes was appointed and acted alone as the guardian of the person and estate of the son, Mark Anthony Earl. In February, 1835, he was appointed, with Taunton Earl, guardian of the person and estate of the daughter, Virginia E. Earl. No account of either guardianship has ever been settled.

On the twenty-seventh of August, 1847, Mark Anthony Earl, one of the children, died, after he had attained his majority, leaving his sister Virginia his heir at law. At the time of his death he was seized of considerable real estate, which he inherited from his father, and which thereupon vested in his sister as his heir at law. It is also claimed that at the time of his death he was largely indebted to Sykes, partly for money advanced by him as guardian during his minority, and partly for advances made after he was of age. These advances are claimed to have constituted by contract a claim upon the sister's interest in the land of which Mark Anthony Earl died seized.

After the death of her brother, on the twenty-seventh of September, 1848, Virginia E. Earl, having intermarried with Jacob R. Taylor, gave to Sykes a letter of attorney empowering him to sell certain real estate which had descended from her father to her brother and herself, and

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which upon her brother's death vested in her. The real estate was sold by virtue of that power for \$6500, of which \$3000 was received by Sykes on the thirtieth of March, 1850, and the balance, amounting with interest to \$4082.50, was received by him on or before the first of July, 1853. For that balance this suit was instituted.

On the eleventh of September, 1850, after the receipt by Sykes of \$3000 on account of the sale of the land, a settlement was made or attempted between Virginia, the ward, and her husband, of the one part, and Sykes and Taunton Earl, as her guardians, of the other, and the instrument was executed by Sykes and Earl which forms the subject of the present controversy. After reciting the fact of the settlement with the guardians and their discharge from their guardianship, the instrument is as follows:

"Now we, the said George Sykes and Taunton Earl, do hereby acknowledge that there is due to the joint estate of the said Virginia E. Taylor and her brother, the late Mark Anthony Earl, deceased, the sum of \$3500 from Thomas P. Barkalow, for which we hold proper vouchers and securities, and we do hereby covenant and agree to and with the said Jacob R. Taylor and wife to account to them for their legal interest in said sum, whenever the same shall be collected, anything in the said acquittance or discharge to the contrary thereof in anywise notwithstanding."

Sykes now claims that notwithstanding that settlement with his ward and his discharge from his guardianship, and consequent release of his sureties, he still has unsettled claims against his ward for moneys advanced while guardian and for commissions as guardian. He also claims that there are debts due him from Mark Anthony Earl's estate which are a legal lien upon this estate in the hands of the sister.

After this contract was executed, Taylor and wife conveyed all their interest in her estate to Thomas William-

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son, to hold in trust for the wife. The wife has since died, leaving an infant son entitled to the estate. The bill was filed by Williamson, as trustee for the infant, to compel the payment by Sykes of the money due upon his contract. Prior to the filing of the bill, and on or before the first of July, 1853, Sykes had received the whole of the purchase money, amounting with interest to \$4082.50 which he covenanted to account for whenever received. He has made no settlement of the estate of Mark Anthony Earl. He has exhibited no account of his claim against Virginia.

The bill in this cause was filed on the seventh of July 1858, and the subpoena made returnable on the nineteenth of that month. On the tenth of September, he obtained sixty days further time to answer. Four months passed, and no answer was filed. On the fourth of February, 1859, he was again ordered to answer. The court closed before the time for answering expired. More than a year elapsed: the defendant availed himself of the delay, and filed no answer. Upon the opening of the court he was again ordered to answer. He refused or neglected to comply. On the sixteenth of April, 1860, a decree *pro confesso* was made, and the matter referred to a master to take proofs.

On the thirtieth of July, 1860, after the complainant had offered his evidence before the master, the defendant asked to open the decree and for leave to answer. Even then the facts now relied on as a ground of equitable relief were not brought to the notice of the court. On the thirtieth of November, 1860, when the complainant's case was about to be brought to final hearing, Sykes exhibited his bill, already referred to, to reform the contract of 1850, and now asks that proceedings in the original cause be stayed until the questions involved in this new suit be disposed of and determined.

I have given thus in detail a history of this transaction, as stated by Mr. Sykes himself and as proven by the re-

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cords of this court, and it exhibits a case of such extreme persistent breach of duty on the part of a trustee towards those whose estate he has in his hands as would fully justify the court in refusing to grant him any relief. It is not necessary to impute intentional fraud. It is enough to see there has been a breach of duty to his *cestui que trusts* and a persistent refusal to make the very settlements which he now asks to make.

This neglect may to some extent be susceptible of explanation, and upon the facts, as they now appear, the report of the master is for a larger amount than is equitably due. I am disposed, therefore, to admit the defence; but it must be done in such manner and upon such terms as will, as far as possible, guard the rights of the infant *cestui que trust* and avoid unnecessary delay. There is, in my judgment, no necessity for this bill to reform the contract. The whole controversy may be settled in the original cause if the defendant will consent to answer and exhibit his accounts. At any rate the defendant may fully protect himself by his answer. As the bill to reform the contract is framed it is obvious that great delay must intervene before the controversy can be settled. That question meets us in *limine* before any account can be taken.

I shall direct the master's report and decree *pro confesso* to be opened, and the defendant permitted to answer upon the following terms, *viz.* that on taxation and demand the costs that shall have been incurred by the complainant since and including the first order requiring him to answer be paid; that he file his answer to the complainant's bill, together with his accounts touching the matter in controversy, within thirty days from this date, and that within the same time he give to the complainant a bond with sufficient security, to be approved by one of the masters of this court or by the Chancellor, with condition that he will faithfully account for the trust funds in his hands, and that he will pay to the complainant or to his

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cestui que trust the amount which shall eventually be decreed against him.

The last condition is annexed as a matter of obvious justice. The defendant is here asking a favor. The whole difficulty and delay have been occasioned by his own acts and breach of duty. The further protraction of the controversy may end in a total loss of the claim, and the least that can be done is to afford such protection to her interests as shall prevent any decree that may be made in her favor from proving nugatory.

ADMINISTRATOR OF EZRA OWEN vs. ADMINISTRATORS OF
MARY OWEN.

A testator devised as follows, viz. "Item. I give and bequeath to my beloved wife the use and benefit of my home farm on which I now live as long as she remains my widow. At her marriage or decease, I will that the aforesaid farm be sold at one or two years' credit. Item. I give and bequeath also to my beloved wife Mary five hundred dollars of the money arising out of the sale of said farm." By a subsequent clause, the testator gave as follows: "Item. I give and bequeath to my beloved wife Mary one hundred dollars out of the personal estate."

Held, that the bequest of five hundred dollars to the wife was vested at the death of testator, and at her death passed to her personal representative.

Vanatta, for complainant.

Dalrymple and *Little*, for defendants.

THE CHANCELLOR. Ezra Owen, by his will, gave and devised as follows:

"Item. I give and bequeath to my beloved wife the use and benefit of my home farm on which I now live as long as she remains my widow. At her marriage or decease, I will that the aforesaid farm be sold at one or two years' credit. Item. I give and bequeath also to my be-

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loved wife Mary five hundred dollars of the money arising out of the sale of said farm." By a subsequent clause, the testator gives as follows: "Item. I give and bequeath to my beloved wife Mary one hundred dollars out of my personal estate."

The widow died intestate, having never married again. The legacy of \$500 bequeathed to her out of the money arising from the sale of the farm is now claimed by her administrators as a vested legacy. This claim is resisted by other legatees under the will on the ground that the legacy is contingent. The case does not come within the operation of the numerous authorities to be found in the books on the subject of vested and contingent legacies. Those authorities very generally, if not universally, apply to cases where the bequest depends upon some future contingency. And the real question in such cases is, whether the language of the will imports a present gift, to be paid upon the happening of the contingency, or whether the gift itself depends upon the contingency, as where a legacy is given to a man when he attains the age of twenty-one years, or to be paid at twenty-one. If the language imports a present gift, the contingency attaches only to the time of payment, and the legacy is vested. If, on the other hand, the gift itself, and not the enjoyment only, is made to depend upon the happening of the contingency, the legacy is contingent and fails upon the death of the legatee before the happening of the contingency. So where, as in this case and as in many of the reported cases, land is given to a widow for life, and on her death is directed to be sold, and out of the proceeds of the sale legacies are given to third parties, and the legatees die before the tenant for life, the question necessarily arises whether it was a present gift to be received in future, or whether the contingency was a condition of the gift itself. In all such cases the gift may depend upon the happening of the contingency in the lifetime of the tenant for life, and to such cases the well settled rules of

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construction apply. Now it is obvious that there is no room for the application of these rules of construction to the present case. Here the land is given to the widow for life; on her death the land is to be sold, and her legacy paid out of the proceeds. The death of the legatee is the event upon which the land is to be sold and the legacy paid. If the legacy ever vests, it must vest immediately upon the death of the testator. There is no future contingency upon which it can by possibility vest, for the legatee, of necessity, must die before the contingency happens. If a legacy at all, it is a vested legacy.

The real question in the case would seem to be, whether the testator intended to give the legacy of \$500 to the widow except in the event of her marriage. If we were at liberty to substitute conjecture for construction it might be suggested as very probable that the real object in the mind of the testator in giving the legacy was to make provision for the wife upon her marriage in lieu of the use of the farm, which was then to be sold. That his real intention would have been expressed by a bequest as follows: "I give to my wife Mary *in the event of her marriage* \$500 of the moneys arising out of the sale of said farm." But we are not at liberty to arrive at the testator's meaning by conjecture, much less to supply it by interpolation.

If the legacy had been given upon the event of her marriage alone it would have been clearly contingent. The gift would not have vested except in the event of her marriage. But the legacy is given upon the event of her marriage or death: as to the latter, as has been said, there can be no contingency. The only mode in which effect can be given to the provision of the will is to hold that the legacy to the widow is a gift in *presenti*, to be paid upon the sale of the farm, either at the marriage or death of the widow.

The language of the will accords with this conclusion. The terms of the bequest import a present gift. The same terms are employed in the gift of the legacy of

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\$500 as are used in giving to the widow the use of the land and the legacy of \$100 out of the personal estate. The land is to be sold at the death or marriage of the widow, but the gift is immediate.

The legacy to the widow is vested. Her administrators are entitled to receive it.

JOHN G. BROWN vs. THE LEXINGTON AND DANVILLE RAILROAD COMPANY.

Where it appears that by the judgment of a court in another state, between the same parties, all the material matters of equity relied upon by the complainant in his suit in this court are adjudicated and settled, the bill of complaint will be dismissed.

A court of equity will not permit a party who has had his rights fully investigated and decided in a court of equity in another state to avoid a final decision in that tribunal, and to raise for reinvestigation the same questions on the same facts.

William Halsted, for defendant.

Strong, for complainant.

THE CHANCELLOR. The complainant's bill is founded upon a contract entered into between the parties in the year 1857. The complainant was a broker, transacting business in the city of New York. The defendants are a corporation chartered and conducting railroad operations in the state of Kentucky. In May, 1857, the defendants placed in the hands of the complainant, to be sold, exchanged, or negotiated for their benefit, one hundred and twenty-four bonds of the company, for \$1000 each. For these bonds the complainant was to account to the company at the rate of sixty-five dollars on the hundred. After satisfying an acceptance for \$15,000, made by the

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complainant, the balance of the net proceeds was to be deposited in the Bank of America to the credit of the president of the company. Thirty-five per cent. of the par value of the bonds, or any excess which the complainant might receive over sixty-five per cent., was, by the terms of the agreement, to pay the complainant's commissions and all expenses.

On the fourth of August, 1857, the company, by a letter of attorney of that date, reaffirmed their contract with the complainant, and constituted him their attorney in fact, empowering him, among other things, to exchange their bonds for real estate or other property, to sell, exchange, or mortgage such real estate so as to convert it into cash or on reasonable time, and to control such real estate as agent or trustee of the company.

By virtue of this contract, and as the bill alleges by virtue of instructions given or of authority conferred by the president of the company, the complainant disposed of thirty-nine of said bonds, viz. twenty-three in purchase of a farm at Prospect Plains, with the stock, farming implements, and growing crops, in this state, nine in exchange for real estate in the city of New York, five in purchase of an invoice of marble at San Francisco, one delivered to counsel in payment for his services, leaving one not clearly accounted for. The remaining eighty-five bonds passed into the hands of a receiver, appointed by the Supreme Court of the state of New York upon the application of the company.

In the month of December, 1857, the letter of attorney to the complainant was revoked, and in January, 1858, by an injunction issued out of the Supreme Court of New York, at the instance of the company, he was restrained from any further sale or disposition of the bonds.

The bill charges that the contract between the parties was violated by the company, and claims that, by virtue of the contract, the complainant is entitled to receive thirty-five per cent. on the par value of the bonds thus

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placed in his hands, which would or might have been realized by the complainant but for the illegal interference of the company. The bill further claims that the complainant was entitled to hold the said bonds as collateral security for acceptances made and liabilities incurred by him for the benefit of the company which are still outstanding against the defendant.

The bill prays that an account may be taken of all the transactions between the parties in respect to their said agreement, that the company may be decreed to pay to the complainant what is justly due him, and that the defendants may be restrained from proceeding at law against the complainant.

It is admitted by the complainant's bill, and established by the evidence in the cause, that a suit was instituted by the company against the complainant in the Supreme Court of New York in relation to these bonds, and a judgment therein recovered against the complainant prior to the commencement of this suit. It becomes material, therefore, to inquire how far the judgment in that cause may have concluded the rights of the parties or may affect the complainant's title to relief in this court.

The railroad company, by their complaint in that cause, after setting out the contract between the parties, claimed from the defendant sixty-five dollars on the one hundred of the amount of the bonds disposed of by Brown, and that he should surrender the residue of the bonds remaining undisposed of, or pay to the company sixty-five dollars on the one hundred on account thereof. The prayer of the complaint was—(1) that the defendant should be adjudged to deliver to the company the bonds retained by him, and that in the meantime he should be enjoined from disposing of them; (2) that the property taken by Brown for the bonds disposed of by him should be disposed of under the order of the court, and the proceeds thereof applied to the payment of sixty-five per cent. of the amount of the bonds disposed of; and in case the pro-

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ceeds of the sale were insufficient for that purpose, that the company should have judgment against the defendant personally for the deficiency, and that the plaintiff should have such other and further relief in the premises as might be agreeable to equity and good conscience.

By his answer to this complaint, Brown, the defendant, set up by way of defence, among other matters—that the powers conferred upon him by the company as their agent and trustee; the exchange of the bonds for real estate in pursuance of the powers conferred; that such investments were made in good faith and with the knowledge and approval of the company; that he had given letters of credit to the company, and had made acceptances for them to a large amount, which were still outstanding; that he was entitled to hold the bonds placed in his hands for his own profit and indemnity; that the company had no right, without his assent, to revoke his authority and discontinue his agency until his charges against the company were satisfied; and as a counter claim, the defendant insisted that the plaintiffs were indebted to him in a large amount for services performed, for commissions on said bonds, for outstanding acceptances, and for damages. Very voluminous evidence was taken by the parties, which has also been used by the court in this case. At May term, 1859, it was adjudged by the court that the defendant should, upon five days' notice, convey to the receiver the farm at Prospect Plains, in this state, with the farming tools, furniture, and personal property purchased by the defendant with the plaintiffs' bonds, and that the same should be sold by the receiver at public auction; that upon a compliance by the defendant with this order, it should be referred to a referee to ascertain and report the amount to be allowed to the defendant for acceptances and advances made by him for the company, and that the receiver, out of the proceeds of the sale, should first pay to the defendant what should be found due him on said account above the sum due

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from him to the plaintiff for nine bonds not invested in real estate; that he should pay the plaintiffs sixty-five per cent. of the amount of thirty bonds of the plaintiffs exchanged by the defendant for real estate, being \$19,500, with interest thereon from December 24th, 1827; that the balance of the proceeds of such sale, if any, should be paid to the defendant, and that the eighty-five bonds remaining undisposed of in the hands of the receiver should be delivered to the plaintiffs.

It is evident, from this statement of the pleadings and judgment in the suit between the parties in the Supreme Court of New York, that every material matter of equity relied upon by the complainant in this cause was relied upon in that; that every claim presented in *this* case was urged in *that*, and that the court virtually decided all the issues made in this cause, so far as the complainant's right to an account is concerned, and settled the whole equity of the case.

It is true that that judgment was not carried into execution, and that it has not been pleaded in this case as a bar to the complainant's suit. It is, nevertheless, the judgment of a court having jurisdiction of the parties and of the subject matter in a suit between the parties in this cause upon the very matters now in issue between them, and the judgment was not carried into execution solely because of the failure of the defendant to comply with the order of the court to convey the property to the receiver. The question was one peculiarly proper for the cognizance of the courts of the state of New York. It grew out of a New York transaction. The contract between the parties was made there—the bonds were negotiated there—the property acquired in New Jersey formed but a part of a very extensive transaction, the settlement of which by the courts of that state necessarily involved all the material questions at issue between the parties. Aside, therefore, from all questions as to the conclusive effect of this judgment in New York, I am clear that the

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judgment in that case ought to be decisive of the rights of the parties here, and that this court, sitting as a court of equity, ought not to permit a party, who has had his rights fully investigated and decided in a court of equity in another state, to avoid a final decision in that tribunal, and to raise the same questions upon the same facts, and to ask a reinvestigation at the hands of this court.

But it is urged, on the part of the complainant, that he was prevented, by legal proceedings instituted by the railroad company in this state, from complying with the order of the Supreme Court of New York, and has thus been deprived of the opportunity of availing himself of the benefits of that decree. Without pausing to investigate the validity of this objection, either in point of law or of fact—assuming it to be true and well founded, has the defendant any right to an account in this court as against the defendants? He claims to be an agent and trustee of the defendants, and, as such, to have purchased real and personal estate for their benefit, to have expended large sums in its improvement, and to have incurred heavy expenses in its management; that the defendants are seeking by an action at law to recover the bonds paid or exchanged by him for the real estate thus purchased, and that he is entitled to an account and a settlement of all the disbursements and expenses thus made and incurred. A simple statement of the facts disclosed by the pleadings and the evidence in the case will show the grounds of the complainant's title to an account.

In May, 1857, the railroad company placed one hundred and twenty-four mortgage bonds of the company, for \$1000 each, in the hands of the complainant, to raise money to meet the immediate and pressing necessities of the corporation. It is obvious, from the whole evidence in the case, that the design of the company was to convert them into cash or available funds as speedily as possible. To this end the complainant was authorized to sell or negotiate the bonds or to purchase real estate and con-

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rt it into money. The only limitation imposed was at he should account to the company for sixty-five dollars on the one hundred for all the bonds disposed of.

He continued to act as the agent of the corporation, with power to execute the trust reposed in him, from May, 1857, till about the 1st of January, 1858, when his agency was terminated, and eighty-five bonds, then remaining in his hands, were reclaimed by the company. During that period he had sold, exchanged, or otherwise disposed of, thirty-nine bonds, of the par value of \$1000 each, and for which the company was entitled, by virtue of their contract, to receive sixty-five per cent., or \$25,350.

It is not pretended that the complainant has ever paid the company the value of a single bond, or that the company have ever realized a dollar from his operations.

Of the thirty-nine bonds disposed of by the complainant nine were invested in real estate in the city of New York, the whole of which, within a few months of making the investment, were sold under previous mortgages, and proved insufficient to satisfy them. Twenty-three of the bonds were, on the 29th of June, 1857, invested in the purchase of the farm at Prospect Plains, in this state, and the purchase of the furniture, stock, farming utensils, and growing crops thereon. The complainant immediately entered into possession of the house and farm thus furnished and stocked, and has held and enjoyed it as his own, receiving the rents, issues, and profits from that day to this. In May, 1857, five of the bonds were invested in an invoice of marble in California, which is traced into the hands of the complainant's brother, but of which no account has been rendered to the defendants. The remaining two bonds are not pretended to have been disposed of in pursuance of any authority conferred on the complainant or for the benefit of the defendant. It is obvious, then, and so it was adjudged by the Supreme Court of New York, that the complainant is lawfully indebted to the defendants, and that he can have under the

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terms of his contract no claim against them as trustee for the management of the real estate. No matter what may have been the disposition of that real estate, the facts will not warrant calling the defendants to an account. All the investments in personal property were made prior to the execution of the letter of attorney by the defendants and were unauthorized. Giving to the complainant the full benefit of his *allegation*, which is not distinctly in proof in the cause, that the title to the farm in question has been decided to be in the company, and that they have received the value of it, it does not materially aid the complainant's case or entitle him to an account. The farm, with all the improvements put upon it by the complainant, is of far less value than the amount which the defendants were entitled to receive on account of the bonds expended in its purchase. The farm, therefore, admitting it to have been recovered by or for the benefit of the defendants, has not realized to them sixty-five per cent. upon the amount of the bonds vested in its purchase. Even if it be admitted that the complainant might in equity have some claim to compensation for the management of the defendants' land, and for permanent improvements made upon it—he is, nevertheless, indebted to the defendants in \$5850, with interest for the amount of sixty-five per cent. on nine bonds of the defendants not invested in real estate in pursuance of his contract. This sum he is, in equity and by the express judgment of the Supreme Court of New York, bound to pay before he is entitled to any remuneration for his services. It is clearly shown by the evidence that the complainant is under no liability for the defendants; that nothing has been advanced by him, either upon his letters of credit or his acceptances, for the benefit of the company, and that all his acceptances have been taken up and satisfied. In any aspect of the case the complainant is not entitled to an account. He is largely indebted to the defendants. He has no claim in equity to an account as trustee. Every defence which he may

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ve against the demand of the defendants in their action
law is available at law as well as in equity.
The injunction heretofore issued against the defendants
ist be dissolved and the complainant's bill dismissed
th costs.

E TRENTON WATER POWER COMPANY *vs.* ROBERT CHAM-
BERS.

practice commissioners and others appointed to appraise damages and
alue lands taken by incorporated companies by force of their charters
ave frequently, if not uniformly, united the value of the land and the
damages in the same sum without discrimination.

better practice would be to distinguish the value of the land from the
damages.

well settled that the appraisement includes prospective damages re-
sulting naturally and directly from the works of the company for all
time to come.

Summere and *Dayton*, for complainants.

Beasley, for defendant.

THE CHANCELLOR. The first exception to the master's
report is, that it is not made in conformity to the order
reference.

By the decretal order in the cause, the master was di-
tated to make a just and equitable estimate and appraise-
ment of the value of the defendant's lands at the time of
their being taken by the complainants, and of the dam-
ages sustained by the defendant by reason of the taking
of the said lands. The master, by his report, states as
follows: "I do estimate the value of the lands so taken,
and the damages sustained by reason of such taking at
the time of such taking, at the sum of one thousand seven
hundred and twenty dollars. The master has reported

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no separate estimate of the value of the lands and appraisement of damages. I am not satisfied that this is a material departure from the requirements of the order. The terms of the order are in conformity with the terms of the charter of the company making provision for compensation to the landholder. I think it will be found that where lands have been taken by condemnation for public use under provisions of charters similar to the present, the report of the commissioners appointed to value the land and appraise the damages and the verdict of the jury, where a feigned issue has been directed, have very frequently if not uniformly united the value of the land and the damages in the same sum without discriminating the value of land taken and the amount of damages sustained may, as in fact it does in this case, create serious embarrassment in testing the propriety and accuracy of the master's report. The better practice would certainly be to distinguish between the value of the land and the damages.

There is another inaccuracy in the report which, if it were permitted to stand, might be productive of future embarrassment. The order directs the master to make an estimate and appraisement of the value of the lands at the time they were taken and of the damages sustained. The master reports that he has estimated the value of the lands taken, and the damages sustained by reason of such taking, at the time of the taking. But the damages appraised are not to be limited to the time of the taking. It is well settled that the appraisement includes prospective damages, resulting naturally and directly from the work of the complainants, for all time. *Ten Eyck v. The Del. and Rar. Canal Co.*, 3 Harr. 200; *Van Schoick v. The Del. and Rar. Canal Co.*, Spencer 249; *Del. and Rar. Canal Co. v. Lee*, 2 Zab. 243.

It may perhaps be inferred, from the language of another part of the report, that this statement is a mere

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accuracy, and as such open to correction or ex-

xt ground of exception is, that the report is for
mount than is warranted by the evidence. This

is well taken. The defendant's land has been
condemnation without his consent for the use of
lainants. He is entitled to receive full and ade-
compensation for the land and for his damages.
eport of the master is excessive in amount, and
e sustained by any fair view of the evidence.
it must be set aside. I deem this a case pecu-
per for the consideration of a jury, although the
is originally referred to a master by consent of
I will, if either party now desires it, direct an
ascertain the value of the land and damages.

days will be allowed, within which the parties
e their election.



DURANT vs. BACOT.

take has occurred in the sale of lands there is no doubt of the
court of equity to reform the conveyance.

deed is drawn strictly in accordance with the intention of the
though from a mistake in judgment it will not effect the end
ere is no case presented for the interference of the court.

and *Bradley*, for complainant.

ie, for defendant.

ANCELLOR. On the 19th of June, 1827, John
t, by deed of that date, conveyed to William
lot of salt meadow, 50 feet in front and rear,
feet deep, at the intersection of Warren street
turnpike road leading from Newark to Jersey

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City. The lot is described as "beginning at the north side of the turnpike road where Warren street, in the map of the Jersey Company, would intersect said road, and extending thence west along the turnpike fifty feet, and north, and parallel with Warren street, one hundred feet." In the year 1830, a second deed was executed by Van Vorst to Durant for another lot, triangular in form, adjoining the first named lot on the west, fronting twenty-six feet on the turnpike, and running to the corner of the first lot in the rear.

In November, 1857, the complainant, in whom the title to both lots is vested, filed his bill against the heirs of Van Vorst to reform the deed of 1830. It charges that the real design of the parties in making the second conveyance was to make the west line of the lot strike the turnpike at right angles; that from a misapprehension at the time of the conveyance, the parties supposed that a front of 26 feet on the turnpike would accomplish that end, whereas it required an additional front of 55 feet on the turnpike to accomplish that purpose. It asks that the deed be reformed so as to effectuate the intention of the parties, and that the defendants be decreed to convey an additional front of 29 feet on the turnpike.

Of the power of the court to reform the contract there is no question. 1 *Spence's Eq. Jur.* 633; *Adams' Eq.* 168; 1 *Snyder on Ven.* 158; 1 *Story's Eq.* § 152; *Chetwood v. Brittan*, 1 *Green's Ch.* 438; *McKelway v. Armour*, 2 *Stock-* 115.

Does the complainant, by his evidence, show a case which calls for or authorizes the interference of the court? If so, is the remedy lost by lapse of time?

The bill charges that the original deed of 1827 was made under the impression that Warren street intersected the turnpike at right angles, and that the deed was intended to convey a rectangular lot; that, contrary to such impression, it was found that the roads intersected each other at an acute angle, and that the lines of the lot

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are consequently so oblique that a house erected on the tire front of the lot, with its side lines at right angles the road, would unavoidably project upon the adjoining lands of the grantor, and that the buildings of the grantee had by mistake been erected in part on the lands of the grantor.

To remedy this difficulty, and with the view of making the western line of the lot perpendicular to the road, the plaintiff alleges that the second deed was executed, but that the deed, as drawn and executed, does not accomplish the object and intention of the parties. This view of the case is not sustained by the evidence. The angle formed at the intersection of the street being an acute angle, it is obvious that if the grantee occupied the entire front with his building, and extended it in the rear at right angles to the street, the rear of the building would not occupy the land of Van Vorst on the west line, but would encroach upon Warren street on the east line. To avoid this difficulty, or possibly from a mere mistake of location, Durant located his buildings too far west, so that the front of his building upon the turnpike was 26 feet west of his true line and upon the land of Van Vorst. It became necessary, therefore, for him to protect his building by acquiring more front upon the turnpike, and it seems most probable that this was the real design of the second purchase. The difficulty doubtless arose from the lot not being square, but the primary design of the change was not so much to make the lines rectangular as to acquire title to the ground occupied by the buildings. This I deem a fair result of the evidence in the case. So far from the design of the second conveyance being to make the line of the lot rectangular with the street, it is obviously drawn upon the assumption that the west line of the original lot was at right angles to the street, and that the additional purchase made the west line oblique. It is for a half lot, beginning on the turnpike twenty-six feet from the west line of Durant's lot, as formerly con-

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veyed, running thence (not at right angles) but "diagonally, to the rear of said lot, forming a triangle, the base of which, lying along the line of said Charles' lot, is one hundred feet deep from said turnpike road, and the perpendicular along said road twenty-six feet." Now every phrase and expression in that description is applicable, and only applicable, to a lot whose east line, being identical with the west line of the old lot, is at right angles to the street, and whose west line is oblique. Every expression is repugnant to the idea of squaring the lot by making the west line intersect the street at right angles —

But assuming that the real and sole design of the second purchase was to make the lot rectangular, let us see how the case stands upon the evidence. John J. Durant says the lot turned out not to be square; Van Vorst was willing to make it square; my father was anxious to have it square; Mr. Van Vorst said he would sell enough to make it square; my father said he would buy enough to make it square. Mr. Cassedy, the counsel under whose direction the deed was drawn, says, I drew the deed from the orders I got from them; we all three believed, as I now recollect, that that would make the western line of the lot at right angles with the turnpike; I recollect Van Vorst asked how many feet it would take to square it; Durant said about 26 feet, the number of feet in the deed. And on cross-examination, he says—"Durant said it would take 26 feet along the turnpike to square it out; I think both parties said that would square it; I think Van Vorst said, "how much do you want?" Durant said "26 feet;" I think that will square it out; when I said 26 feet, I don't mean to say that I recollect that he said those words, but I mean to say he called for the quantity named in the deed. Now it is evident from this testimony that there is no mistake in drawing the deed. It was drawn strictly in accordance with instructions given. Durant wanted 26 feet; Van Vorst agreed to sell 26 feet; he received pay for 26 feet; he actually conveyed 26 feet.

Emans v. Wortman.

here is no mistake in the deed, and no room for the reformation of this instrument. The whole mistake was the judgment of the parties, or of Mr. Durant himself, to the effect of the purchase upon the shape of his lot. is clearly not a case for the interference of the court. The bill must be dismissed.

EDWIN EMANS and ELIZABETH his wife vs. JOSEPH W.
EMANS and PETER WORTMAN.

a bill unite a demand of several matters of distinct natures against different defendants it is demurrable for multifariousness. if a joint claim against two defendants is joined in the same bill with a separate claim against one of them only, either or both of the defendants may demur for multifariousness.

Dalrymple and Little, for defendants.

Vanatta, for complainants.

THE CHANCELLOR. The complainants in this bill set two distinct and independent claims or grounds of relief.

1. They seek to compel the specific performance of an award in favor of the complainants, made in pursuance of an agreement for submission to arbitration entered into between the complainants and Joseph W. Emans, one of the defendants.
2. To compel the defendants to account for and pay to the complainants the value of the equal half part of a farm of 200 acres, conveyed by the wife of the complainant and the defendant, Joseph W. Emans, to the other defendant, Peter Wortman, by deed executed and delivered the twenty-ninth of October, 1853.

Emans v. Wortman.

A separate demurrer is filed by each of the defendants. The bill is clearly demurrable for multifariousness on two grounds.

1. It unites a demand of several matters of distinct natures against different defendants. The refusal by Emans to perform the award against him, and the refusal by Emans and Wortman, combined, to pay the complainant's wife the value of her share of the farm, are totally distinct matters having no connection with or dependence on each other.

The submission to arbitration grew out of the alleged inequality and unfairness of a partition between the complainant's wife and Joseph W. Emans, with which the sale and conveyance to Wortman was in some wise connected. But the refusal of Wortman to pay the stipulated price of that land, or the fraudulent combination of Wortman and Emans to deprive her of her fair share of the consideration for the conveyance, formed no part of the partition, and was in no wise involved in the subject matter of the arbitration. The submission relates solely to the inequality of the partition between Elizabeth and Joseph W. Emans. The refusal of Wortman to pay the price of land conveyed by them neither produced nor contributed to that inequality. Even against the same defendant a claim for the specific performance of an agreement to submit to arbitration, and a claim for the recovery of the value of land fraudulently withheld, cannot be united in the same bill. It is a misjoinder of different causes of action, which cannot properly be litigated in the same suit. *Boyd v. Hoyt*, 5 Paige 79; *Story's Eq. Pl.* § 271, 530; 1 *Daniels' Ch. Prac.* 383, 393, 395.

Again, admitting that the defendants are properly joined in that part of the bill which relates to the price of land, Wortman has no interest in the subject matter of that part of the bill which relates to the specific performance of the award. He is no party to the submission or to the award. The bill prays no discovery, and

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o relief against him on that ground. He has no vable connection with that part of the complainase. If a joint claim against two defendants is in the same bill with a separate claim against one m only, either or both of the defendants may de-or multifariousness. *Ward v. The Duke of North-and et al.*, 2 *Anstruther* 469; *Boyd v. Hoyt*, 5 *Paige* 79; *Swift v. Eckford*, 6 *Paige* 22; 1 *Daniels' Ch. Pr.* 383,

sustain a demurrer to a bill for multifariousness t several defendants it is not necessary that the de-t demurring should so far answer the bill as to he ordinary general charge of combination. *Mit-Pl. by Jeremy* 181, and note b; *Brooks v. Lord* orth, 1 *Mudd.* 86, (1st. Am. ed. 57); *Salvage v. Hyde*, d. 138.

specific charge of fraudulent combination, made complainants' bill in this case, applies only to the l ground of relief.

s not a case in which the complainants' bill can be led. *Johnston v. Anthony*, 2 *Molloy* 373; *Boyd v. Hoyt*, e 79; *Swift v. Eckford*, 6 *Paige* 22.

demurrer must be allowed, and the complainants' smitted.

CHUBB vs. PECKHAM and others.

equity may, in the exercise of a sound discretion, refuse to decree the performance of a hard bargain.

having conveyed his entire estate to his children, upon their stip- g to provide for their parents a comfortable support and mainte- suitable to their condition, wherever they or either of them might to reside, a specific performance of the contract was decreed in his

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It is no defence to such suit that the property conveyed was totally inadequate to the support of the parents.

Evidence of a cotemporaneous parol agreement is inadmissible to alter the terms of a written contract.

Ransom, for complainant.

THE CHANCELLOR. On the 7th of April, 1855, William Chubb and Lydia his wife, by deed of that date, conveyed to their two children, William F. Chubb and Emma Peckham, a small farm, in the county of Somerset, containing about 46 acres of land.

By an agreement, of even date with the deed, under the hands and seals of their children, made between the children of the one part, and their parents of the other, the children agreed, in consideration of the conveyance, to provide for the support and maintenance of their parents, and each of them, in a comfortable manner, to provide and furnish each of them with proper and suitable clothing, food, medicine, and medical attendance, when sick, and to find a comfortable place to live in—all to be according to their age and situation in life, for and during their natural lives and the life of the survivor of them. The children further agreed to accept the title which the father had in the premises; and in case of any adverse claim of title, to be at the expense of defending the title which they thus acquired.

This bill is filed by the father against the children, and charges a failure upon their part to perform the contract, and asks either that the contract be rescinded, and the lands reconveyed to the complainant, or that a specific performance be decreed.

A decree *pro confesso* is taken against the son. The daughter alone answers. She admits the contract, alleges that they took the title at her father's request, and solely for the purpose of aiding her aged parents; that she has received nothing whatever from the farm; that its entire proceeds, together with considerable sums advanced by

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herself, have been appropriated to the support of her parents; that at the time of the contract it was understood and agreed that the father should remain upon the farm, and assist in its cultivation, until a sale could be effected: that the proceeds of the farm and the limited means of the defendant are utterly inadequate to support her parents elsewhere than on the farm and with their assistance. She proffers herself ready and willing to reconvey the land, if the sums she has advanced under the contract are repaid to her.

The evidence in the cause shows that the farm was conveyed to the defendants not at their request, but at the solicitation of the complainant, and that the title was reluctantly accepted by Mrs. Peckham, the daughter; that she has derived no benefit from it, but that the contract into which she entered upon taking the title has involved her in serious trouble and pecuniary loss. The evidence, moreover, tends to confirm the allegation of the answer, that she accepted the title, and entered into the contract for her parents' support upon the faith of a parol agreement, cotemporaneous with the written contract, that her father would remain upon the farm, and assist in its cultivation until it could be advantageously sold, and the proceeds applied to his support and the support of his wife at such place as they might choose to reside. This evidence, however, is inadmissible to relieve her from the obligation of the written contract. It is in direct conflict with the express terms of her written engagement, by which it is stipulated that the parents, or either of them, should be at liberty to reside in the city of New York or elsewhere. Evidence of a cotemporaneous parol agreement is inadmissible to alter the terms of the written contract.

However unfortunate or oppressive may be its terms, the parties must abide by their engagement as it is written.

The contract cannot be rescinded or a reconveyance effected, even by the consent of the defendants. The

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wife of the complainant joined in the conveyance, and the contract of the grantees is for her maintenance as well as that of her husband. Her rights are to be protected. She is not a party to the suit. She does not ask, and the evidence warrants the belief that she does not desire a dissolution of the contract. She resides upon the farm with her son, and is supported by her own labor and the assistance of her children. The husband and wife do not live together. The complainant contributes nothing to her support. His interest in the land has been sold, and to order a reconveyance might strip both parties of their means of support, and must of necessity be prejudicial to the rights and interest of the wife. This consideration is decisive against rescinding the contract for her support and ordering a reconveyance of the land.

There must be a decree for a specific performance. Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.

But this is not a case for the application of the doctrine nor for the exercise of such discretion. The father conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suited to their condition, wherever they or either of them might choose to reside. It is no answer to a prayer for specific performance that the property conveyed is of little value and totally inadequate to the support of the parents in the city of New York or elsewhere than in the country. That was a proper subject for consideration by the parties when the contract was entered into. But having been made voluntarily and in good faith, the parents are entitled to their support at the hands of the grantees so long as the avails of the property conveyed or the means of the children will suffice for that purpose.

There must be a decree for a specific performance and a reference to a master to ascertain and report what would

Bruce v. Gale.

e a suitable provision, weekly or otherwise, for the comfortable support and maintenance of the complainant, and also of his wife, according to the terms and provisions of the contract.

BRUCE and COOK vs. GALE and others.

Where a cause is settled by the parties out of court, without any agreement as to the disposition of the suit or as to costs, neither party is entitled to costs against his adversary.

Bill to set aside judgment at law as fraudulent against subsequent execution creditor, and for an injunction to restrain a sale of the debtor's property by virtue of the execution alleged to be fraudulent. No plea, answer, or demurrer was filed. By an arrangement between the parties, the complainants' claim was satisfied, upon his consenting that the sheriff should proceed to a sale under the first execution. No agreement was made, and nothing was said as to the disposition of the suit in chancery, or as to the costs therein.

The question is now submitted without argument, whether the complainant is entitled to costs.

Vanatta, for complainants.

BY THE CHANCELLOR. The rule is well settled at law, that where the parties to a suit make a settlement between themselves out of court without reference to costs, each party shall pay his own costs. *Anderson v. Exton*, 1 *Smith* 77; *Den v. Pidcock*, 7 *Halst.* 363.

The rule is the dictate of common sense, and is both just and reasonable. There is no reason why it should not be observed as well in equity as at law.

In *Eastburn v. Kirk*, 2 *Johns. Ch. R.* 317, where the

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cause had been settled between the parties upon certain terms, one of which was that the question of costs should be submitted to the Chancellor, the court refused to decide the mere question of costs, but left each party to pay his own costs.

Neither party is entitled to costs against his adversary.

RANSOM vs. THE PRESIDENT, DIRECTORS, AND COMPANY OF
THE STONINGTON SAVINGS BANK and others.

A corporate aggregate must answer under the seal of the corporation. They may adopt and use any seal *pro hac vice*. If the seal is dispensed with it should be by leave of the court previously obtained and for good cause shown.

This was a motion to suppress answer.

Ransom, for motion.

Gilchrist, contra.

THE CHANCELLOR. The defendants, the Stonington Savings Bank, claiming to be a body corporate created by the laws of the state of Connecticut, filed a paper purporting to be an answer to the complainant's bill not under their corporate seal. The paper was signed by counsel, and verified by the oath of the secretary of the corporation in the usual form. An affidavit has also been made by the secretary of the company and filed, stating that the bank has no corporate seal. The complainant's counsel moves to suppress the answer as irregular.

A corporation aggregate answers under the seal of the corporation. *Cooper's Eq. Pl.* 325; *Milford's Pl.* 9; *Rev v. Windham*, *Cowp.* 377; *Story's Eq. Pl.* 874; 1 *Vern.* 117; *Angel & Ames on Corp.* § 665; 1 *Newland's Ch. Pr.* 131; 1 *Daniels' Ch. Pr.* 876, note 1; 3 *Hoffman's Ch. Pr.* 239.

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The practice is in accordance with the ancient though somewhat obsolete rule of the common law, that a corporation, being an invisible body, acts and speaks only by common seal. 1 *Bla. Com.* 475.

If the uniform practice of the court in this particular is departed from, and the use of the seal dispensed with, it could be by leave of the court previously obtained and for good cause. The affixing of the corporate seal is the usual mode of authentication, and affords the best evidence that the paper purporting to be an answer is in fact the answer of the corporation. As the answer now stands, there is no evidence whatever that it was ever authorized or adopted by the corporation. The presumption, indeed, is the other way; for the caption of the answer states that it is under the common seal of the corporation, when in fact it is not so authenticated, thus affording a presumption, at least, that it was never adopted as their answer. The fact that the corporation have no common seal affords no ground for relaxing the practice. It is an inseparable incident of every corporation that they may have a common seal, and make, alter, and renew the same at pleasure. *The case of Sutton's Hospital*, 10 *Coke* 30 *C*; 1 & 2 *Ames on Corp.* § 217.

They may use and adopt any seal *pro hac vice*. It may be a bit of paper attached by wafer, without any impression indicative of a common seal of a corporation. *Mill-boundry v. Hovey*, 21 *Pick.* 417.

Any seal whatever is attached to the answer by the authority of the corporation it becomes their seal, and if the seal is verified in usual form by the signature of an officer of the corporation, his affidavit that the seal so verified is the seal of the corporation, and was affixed by the authority of the corporation, the answer upon its face purports to be and is under the corporate seal.

Execution is allowed with costs.

Brooks v. Lewis.

BROOKS and KENDLE vs. LEWIS and others.

On bills to restrain the execution of process or the performance of office acts the sheriff is made a party, as the design of the injunction is to restrain him from acting; but where no relief is prayed, and no debt is asked against the officer, it is not necessary, nor usually expedient, for the sheriff to answer.

S. A. Allen, for defendants, in support of motion.

J. Mulford and *J. Wilson*, contra.

THE CHANCELLOR. The injunction in this cause issued to restrain the sheriff of the county of Salem from delivering a deed to one of the defendants, in pursuance of a sale made by him by virtue of a writ of *feri facias* issued out of the court for the sale of mortgaged premises. The material allegations of the bill which induced the allowance of the injunction are—that there were but few persons present at the sale; that the terms of sale were unusual and hard; that the property was cried on the last bid for a very short time, and was struck off without a fair opportunity of further bidding; that the property was sold at a great undervalue, and that a person was present at the sale prepared to bid \$500 more for the property than the price at which it was struck off, and has since the sale offered that advance, which was refused by the purchaser, who asked \$7000 for the property, and refused to sell it for less than that sum.

The injunction was granted upon the ground that the sale was unfairly conducted; that the property was struck off at an undervalue without a fair opportunity afforded for further bidding, and that the facts warranted the belief that a higher price would be realized upon a resale.

All the material charges of the bill are explicitly and fully denied by the answers of the defendants. As the

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case now stands upon the answers, there is no ground whatever for the continuance of the injunction.

An answer is filed by the sheriff. This was unnecessary. In all bills to restrain the execution of process or the performance of official acts the sheriff is made a party, as the design of the injunction is to restrain him from acting, and the writ is directed to him. But usually no relief is prayed and no decree asked against the officer. Though he is at liberty to answer, and in some cases it may be proper for him to do so, yet it is not necessary, nor usually expedient. The sheriff has no interest in the controversy; his rights are not to be affected by it, and it is not proper that he should be put to answer or subjected to expense in a controversy in which his official acts alone are called in question at the instance of third parties. If the sheriff's statement is deemed material for the interests of the defendants, it may be appended as an affidavit to the answer, to be used on the motion to dissolve, or his testimony may be taken by leave of the court in the progress of the cause.

The injunction is dissolved with costs.

THE BOSTON FRANKLINITE COMPANY vs. THE NEW JERSEY
ZINC COMPANY.

The complainants were the undisputed owners of all the franklinite and iron ores upon a certain tract, when they were found separate from the zinc, and they claimed to own all the franklinite and iron ores, whether they existed separate from the zinc or not. The defendants were the undisputed owners of all the zinc and other ores on same premises, except franklinite and iron ores, and they claimed to own the franklinite and iron ores when they did not exist separate and distinct from zinc ores. Upon bill filed an injunction had been allowed restraining the defendants from mining, carrying away, or using any franklinite or iron ore. It appeared that the ores or minerals were found combined in such varied proportions as to render it often difficult to decide which metal

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preponderated in quantity or value in a given specimen, and to render difficult, if not impossible, to mine either ore without at the same time taking the other. Upon motion being made to dissolve the injunction on the ground that the whole equity of the bill was denied by the answer, *held*—

1. That the dispute was not about facts, but was a question of legal construction and the proper interpretation of the grants of the mining rights.
2. That the matters in controversy were not of such a nature that they could be met and denied by the answer, so as to entitle the defendant to a dissolution of the injunction as a matter of course.

This was a motion to dissolve an injunction.

Hayes and Bradley, for motion.

McCarter and Hamilton, contra.

THE CHANCELLOR. An injunction has been issued out of this court, at the instance of the Boston Franklinite Company, against the New Jersey Zinc Company restraining the latter from mining, carrying away, or using any franklinite ore or iron ore found or to be found upon part of a tract known as Mine-hill, in the county of Sussex.

The zinc company, having answered the bill, ask dissolution of the injunction, upon the ground that the whole equity of the bill is denied by the answer.

Neither party owns the soil. Each party is the owner of certain mineral and mining rights.

The zinc company are the *undisputed owners* of all the zinc and other ores found or to be found in or upon the premises, except franklinite and iron ores. They claim also, to own the franklinite and iron ores when they do not exist separate and distinct from the zinc ores.

The franklinite company are the undisputed owners of all the *franklinite and iron ores* when they exist separate from the zinc. They claim, also, to own *all* the franklinite and iron ores in or upon the premises, *whether they exist separate from the zinc or not*.

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In the progress of working the mines, upon the premises it has been ascertained that the two ores or minerals are found extensively in mechanical combination, and in such varied proportions as to render it often difficult to decide which metal preponderates in quantity or value in a given specimen, and to render it difficult, if not impracticable, to mine either ore without at the same time taking the other.

The question of title between the parties is, who is entitled to the ores or to work the mine when the ores exist in such mechanical combination?

Another question is necessarily involved in the controversy—where two ores thus exist in mechanical combination, what gives the name to the ore? By what rule is its title to be denominated a zinc or iron ore, to be decided? Is it by the preponderance in quantity of one metal over the other in a given mass or the excess in value that fixes the proper appellation of the ore? If a given specimen contain fifty per cent. of iron, and only twenty per cent. of zinc, is it an *iron* ore? Or if the twenty per cent. of zinc ore in the specimen, though less in quantity, is of greater value than the iron, and will better repay for the labor of working it, does it become a zinc ore?

These are the two questions which are raised by the answer, and which the court, in dissolving the injunction, are called upon to decide.

Now, from the nature of the issues made by the answer, from the very character of the points upon which the controversy turns, it must, I think, be apparent that the answer cannot so deny the equity of the bill as to entitle the defendants to a dissolution of the injunction, according to the well settled practice of a court of equity.

It is not necessary to turn to books in support of the familiar principles that entitle the defendant to a dissolution of the injunction upon the answer. The answer must deny the facts upon which the equity of the bill rests. It

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must be a direct and positive denial, not argumentative; it must be of facts within the *knowledge* of the party, and not upon mere belief or opinion.

So far as the answer respects the extent of the rights of the parties under their respective titles and acts of incorporation it is clearly not a fact within the knowledge of the defendants, but a question of legal construction which the defendants cannot settle by an answer, and which the court ought not to decide except upon a final hearing.

So in regard to the character of the ore and its appropriate denomination as a zinc or franklinite ore, the dispute is not so much as to its constituent elements as it is as to its appropriate appellation—not so much as to the thing as to the name. It is not denied that both minerals are present in the mass existing in close mechanical combination, nor is the dispute mainly in relation to the relative proportion of the two elements. The apparent conflict in the evidence upon this point may be fairly attributable to the fact, that the witnesses refer to different specimens, or different veins, or different portions of vein of ore. But in speaking of the same ore, one witness says, it is a very superior iron ore, it contains over 60 per cent. of pure franklinite; another witness speaking of the same ore says, I call it a very rich zinc ore, it contains 30 per cent. of pure zinc. Now there is no dispute or contradiction in regard to the fact. The simple fact is, that the mass contains (upon the hypothesis stated) 60 per cent. of franklinite, 30 per cent. of zinc and 10 per cent. of other earths or minerals. The witnesses differ only as to the name by which the mass should appropriately be called, and that difference produced solely by the different standards which the witnesses adopt as the ground of their opinion. When, therefore, the answer affirms and the witnesses testify, that the ore in question is a rich zinc ore, it does not deny the fact upon which the equity of the bill rests, and which the

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complainants' witnesses affirm, that it is a valuable franklinite ore, and one in which that metal decidedly preponderates over the zinc.

In fact the entire structure of the answer, the character of the evidence adduced in support of it, and every step in the very able and discriminating argument by which the positions of the answer were sought to be sustained, demonstrate that the entire controversy is not a dispute about facts, but is a question of legal construction and the proper interpretation of the grants.

These are matters which cannot be met and denied by an answer. They are questions moreover which, considering the nature of this controversy and the magnitude of the interests at stake, ought not to be decided except upon the final hearing.

On the hearing of the motion, a large portion of the testimony of one of the parties, which was otherwise competent, was excluded in compliance with a rule of the court. A decision upon the merits under such circumstances could not be satisfactory, and would only tend to embarrass and protract the controversy. On this ground, notwithstanding the very full and satisfactory argument, upon both sides, of the legal questions involved, I purposely and scrupulously abstain from any intimation of opinion upon the merits of the controversy.

The motion to dissolve the injunction must be denied.

The injunction however, as it now stands, is too broad and indefinite in its terms. It restrains the zinc company not only from mining, carrying away, or using any franklinite ore or iron ore on the premises, but also any of the ores and minerals in controversy in the cause. If by the ores and minerals in controversy is meant simply franklinite and iron ore, the clause is unnecessary. If more is meant it is wrong. The franklinite and iron ores are all the franklinite company are entitled to. If it be true, as the defendants contend, that the ore which they are mining and using is not franklinite, but zinc ore, the in-

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junction, thus modified, will not interfere with their rations. If on the other hand, it shall prove that t ores are found in such close mechanical combination neither can be successfully worked without mining l then it is necessary that the limits of the rights of respective parties under their grants shall be clearly fined before either party can safely and successfully c on mining operations.

This modification of the injunction may, I am aw give rise to embarrassment upon a question of the all violation of the injunction. It will, however, also l if the parties act in good faith, to a speedy determina of the case upon its merits.

NOTE.—Immediately after the modification of the junction the defendants commenced removing the ore controversy. An application was thereupon made to strain the defendants from proceeding founded upon davits that the ores which were being removed v franklinite, and not zinc. The order applied for granted, thus virtually restoring the injunction to original form.

JACOB SCHENCK vs. ELIAS H. CONOVER.

After sale on foreclosure the court will compel the mortgagor, or any son who has come in possession under him pending the suit, or w title is not superior to his, to deliver up the possession of the prem and will not drive the purchaser to an action of ejectment.

And this assistance will be extended to a stranger to the record purcha at such sale as well as to the mortgagee.

The mode of proceeding has been as follows, viz. 1, a demand of posses by the purchaser of the tenant in possession accompanied by an ex of the deed from the sheriff or master; 2, order to deliver possess 3, injunction; and 4, writ of assistance.

The exercise of the power rests in the sound discretion of the court. will never be exercised in a case of doubt, nor under color of its e cise will a question of legal title be tried or decided.

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THIS was a motion for an order on defendant to deliver possession of lands sold on foreclosure.

Richey, for motion.

W. Halsted, contra.

THE CHANCELLOR. A decree of foreclosure and for the sale of the mortgaged premises having been made in this cause, a writ of *fiery facias* issued to the sheriff of Hunterdon, by virtue of which the premises were sold and conveyed to John A. Carroll. Carroll having received his title, and possession of the premises having been demanded and refused, now applies to the court for an order upon the defendant to deliver possession. The order is asked for as the foundation of an application for a writ of injunction and of assistance.

An affidavit of Conover was by consent read upon the hearing; but there is nothing in the facts stated in the affidavit which is deemed material to the question in controversy.

The objection to the application is, that the court have no power to make the order applied for, and that it is not warranted by the practice of this court.

The practice of putting the purchaser into possession of premises purchased under the decree of this court is of recent origin. The earliest case was that of *Grant v. Quinn*, in 1853. The case was not contested. In 1854, a similar order was made in the case of *Kennedy v. Vreeland*. This case was contested, and an appeal was taken from the order of the Chancellor. The power of the court was not seriously contested, the appellant's point being that "the remedy (unusual in this state) by writ of assistance is not properly grantable in this case, because proceedings are pending in the Court of Chancery to set aside the petitioner's title for good and sufficient causes." The order of the Chancellor was unanimously affirmed at March term, 1855. Since then similar orders have been

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of frequent occurrence. It might, therefore, be deemed a sufficient answer to the objection to say that the order asked is in accordance with the established practice of this court, and that the practice has been sanctioned by the decision of the court in the last resort.

But inasmuch as the propriety of the practice and the power of the court to adopt it are now drawn directly in question, and as it has not the sanction of long established usage, it may be well to examine both its foundation and its policy.

In *Roberdeau v. Rous*, 1 Atk. 543, Lord Hardwicke said that the delivery of the possession of lands may be enforced in *personam*, which was the ordinary way; but the writ of assistance to put persons in possession as by way of injunction is of more modern date. This was in 1738.

In the later case of *Penn v. Lord Baltimore*, 1 Vesey & 441, Lord Hardwicke said, "the practice of putting a party into possession in a suit concerning lands within the jurisdiction of the court was first begun and settled in the reign of James I., and has ever since been done by injunction or writ of assistance to the sheriff."

This statement of Lord Hardwicke as to the origin of the practice, says Mr. Eden, is clearly a mistake, for many precedents for injunctions to deliver possession after decree and a commission or writ of assistance to the sheriff are in the printed reports as early as the reign of queen Elizabeth; and in a manuscript book of orders (which appears to have been taken from the register books in the Hargrave collection) there are a great many precedents of injunctions to deliver possession of land after a decree, in the time of Henry VIII., Edward VI., and Mary. *Eden on Injunctions* 261, *Waterman's ed.*, vol. 2, 425.

In *Dore v. Dore*, (before the lords commissioners in 1783) by the decree, the estate of the testator was to be sold. The defendant, the widow, who had got into possession under some claim of jointure or dower, was com-

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rected to account. The estate was sold, and the purchaser applied to the widow to deliver possession, which she refused. He then applied to the court, and obtained possession by an order, injunction, and writ of assistance. *Dickens* 617; 1 *Bro. Ch.* 375; 1 *Cox* 101, *S. C.*

In the report of this case by Dickens, the course of proceeding to obtain possession by injunction and the writ of assistance are fully stated.

The practice was adopted also in *Stribley v. Hawkie*, 3 *Atk.* 275, and in *Huguenin v. Bazeley*, 15 *Vesey* 180.

The general result of the cases is, that where lands are within the jurisdiction of the court, and the defendant refuses to perform the decree by giving the plaintiff possession, the court will enforce its decree by the writ of assistance. *Wyatt's Prac. Reg.* 207, (*London ed.* 1800); 2 *Mad. Chan. Pr.* 469, (*ed.* 1822); 1 *Fonb. Eq.* 32, note q; 1 *Newland's Ch. Prac.* 390; 1 *Smith's Ch. Prac.* 447.

In *Garretson v. Cole*, 1 *Harris & John.* 387, Chancellor Hanson said, an injunction for possession is not a new thing in a court of equity. It has long been used in England, and it would disgrace our laws and administration of justice, if after a title to land had been established by the adjudication of a court, there could be no way of obtaining possession but after obtaining judgment in ejectment.

In *Buffum's case*, 13 *New Hamps.* 14, Ch. Just. Parker, in delivering the opinion of the court, says, "the decree in this case may be regarded as establishing an equitable title in the complainant, so that without the execution of any deed by the defendant in pursuance of it, the court would put the plaintiff in possession by writ of assistance, if necessary." See, also, *Devaucene v. Devaucene*, 1 *Edw.* 272.

These cases clearly show the long established and familiar practice of the Court of Chancery, wherever the conveyance of real estate is decreed, to compel the defendant to surrender the possession to the plaintiff: in

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other words, a court of equity will enforce its own decree, as between the parties, without compelling a resort to an action at law.

The same practice is adopted under sales before a master in the English Court of Chancery. 2 *Smith's Ch. Pr.* 213. The application, however, is made not by the purchaser, but by the solicitor of the vendor at the instance of the purchaser.

So on a bill by a mortgagor to redeem the mortgage premises the court will order the defendant to deliver up possession to the plaintiff without putting the plaintiff to his ejectment. *Yates v. Hambly*, 2 *Atk.* 360; *Seaton's Decrees* 146.

In a strict foreclosure the practice is otherwise. In such case the court does not direct the mortgagor to deliver up the possession of the mortgaged premises to the plaintiff; but leaves the plaintiff to his ejectment. *Sutton v. Ston*, 2 *Atk.* 101; *Seaton's Decrees* 140.

The reason for this distinction in practice seems to be, that on a bill to redeem there is a decree for a reconveyance by the mortgagee to the mortgagor. The mortgagor acquires title under the decree of the court, and the court will perfect his title and give him the benefit of the decree by putting him in possession; whereas under a bill for foreclosure the complainant has the legal title, and only asks that the equity of redemption be foreclosed. He acquires no title under the decree of the court. No conveyance is ordered, and no delivery of possession is necessary to give effect to the decree.

It becomes, then, a mere question of practice whether a court of equity will, in the exercise of its undoubted power, give full effect to its decree for the sale and reconveyance of mortgaged premises by putting the purchaser into possession. The subject was fully examined and the practice adopted by Chancellor Kent in *Kershaue v. Thompson*, 4 *Johns. Ch.* 609. In a luminous opinion, in which he examines both the power of the court to adopt the

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practice and the policy of its adoption, he says, "The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective and chargeable with much useless delay and expense, if it were necessary to resort in the first instance to a court of equity, and afterwards to a court of law to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz. the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down, as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject matter. A bill to foreclose the equity of redemption is a suit concerning the realty and *in rem*, and the power that can dispose of the fee must control the possession. The parties to the suit are bound by the decree, their interests and rights are concluded by it, and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court. This is not the doctrine of the cases, not the policy of the law."

This decision has been approved, and the practice adopted in numerous cases. *Ludlow v. Lansing*, *Hopkins* 231; *Valentine v. Teller*, *Hopkins* 422; *Vanhook v. Throckmorton*, 8 *Paige* 33; *Dorsey v. Campbell*, 1 *Bland* 363; *McKomb v. Kankey*, 1 *Bland* 363, note c; *Aldrich v. Sharp*, 3 *Scammon* 261; *Hart v. Lindsay*, *Walker's Ch.* 72; *Benhard v. Darrow*, *Ibid* 519; *Commonwealth v. Ragsdale*, 2 *Hen. & Mun.* 8.

These cases show that at this day, upon a sale under a decree of a Court of Chancery, the delivery of possession to the purchaser by injunction and writ of assistance is well settled and of right when the possessor does not claim to hold by title paramount to the parties.

The case has hitherto been considered solely in reference

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to the general powers of the court without regard to any statutory provision, but the practice is certainly warranted, if not expressly authorized by our statute. *Nix Dig.* 95, § 63; *Rev. Laws* 1820, 702, § 4.

By a clause of that section it is enacted, that the complainant having obtained a decree, it shall be lawful for the said court . . . "to cause by injunction the possession of the effects and estate demanded by the bill, and whereof the possession or a sale is decreed, to be delivered to the complainant, or otherwise according to such decree and as the nature of the case may require."

The Maryland statute of 1785 is identical with our own. In *McKomb v. Kankey*, 1 *Bland* 363, note c, decided in 1807, possession was delivered to a purchaser at a sheriff's sale of mortgaged premises against the lessee of the mortgagor. The Chancellor said, "the general power of the Court of Chancery to issue an injunction directing possession to be delivered is sanctioned by the practice in England and by our acts of assembly. The decree for possession and injunction is a process demandable as much as an attachment or other execution, and ought not to be refused when the power is considered to exist. An application for possession in such case is founded on the general powers of the court and on the act of 1785."

The proper mode of proceeding where the delivery of possession is not included in the decree, as settled in *Kershaw v. Thompson*, and as hitherto adopted in this court, is a demand of possession by the purchaser of the tenant in possession accompanied by an exhibit of the deed from the sheriff or master, order to deliver possession, injunction, and writ of assistance. The preliminary orders are made upon notice and affidavits, the last writ issues of course and without notice.* 4 *Johns. Ch.* 61

* In a more recent case it has been held that the injunction should be dispensed with, and that the writ of assistance should issue in the first instance, upon proof of the service of the order to deliver possession, of demand of possession, and refusal to comply therewith. Notice of the application is necessary.

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Barbour's Chan. Prac. 441. See the Forms, *Hoffman's Master*, 393; *Scaton's Forms* 424, 425.

In *Valentine v. Teller, Hopkins* 422, it was held that the writ of assistance was the first and only process necessary for giving possession, and that the injunction was not necessary. And by the present English practice, regulated by 1 Will. 4, c. 36, upon proof of the service of the order for the delivery of possession, of demand of possession, and of refusal to comply therewith, the writ of assistance issues in the first instance, the writ of injunction as well as the writ of attachment used in the ancient practice being dispensed with. 2 *Daniels' Ch. Pr.* 1280.

The injunction is in fact but a repetition of the order of the court to deliver possession, and it would seem that it might be advantageously dispensed with.

The cases cited meet all the objections that were urged upon the argument to granting the relief asked for in this case. They show that the writ of assistance will issue as well when a special order is made for the delivery of possession after a sale, as when the direction is included in the decree; that it will be granted at the instance of the purchaser after a sale as well as on the application of the complainant; and that it may be made not only as against the defendant, but against any party in possession under him, or by title not superior to his. It is scarcely necessary to add, that the exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. With these limitations of its exercise, I believe that the practice which has been adopted will be found both safe and salutary. The practice of delivering possession of mortgaged premises to the purchaser under a sale made by the authority of this court is, as has been said, of recent adoption in this state. It is not, however, the exercise of a new power. It is but the more extended application of a familiar power which has been exercised in the Court of Chancery for centuries.

Huston v. Cassedy.

HUSTON vs. CASSEDY.

The rule is inflexible, that a sale made by an administrator, or any other person acting in a fiduciary capacity, to himself or for his benefit, will be held void at the instance of the party prejudiced.

The remedy in equity is to set aside the sale on equitable terms, and to treat the administrator as a trustee for the parties in interest.

McCarter, for complainant.

R. Hamilton, for defendant.

THE CHANCELLOR. On the 25th of December, 1848, Andrew Cassedy, of the county of Sussex, died intestate, leaving eight minor children his heirs at law. Part of his real estate was sold, on the application of his administrators, by order of the Orphans Court for the payment of the debts of the estate. Samuel Cassedy, a brother of the intestate, soon after the sale became the owner of the property. This bill is filed by the children and heirs at law of the intestate. It charges that the sale was illegal and fraudulent as against the heirs, being in reality purchased at the instance of the administrator and for his benefit.

The evidence discloses the following facts: The farm was advertised for sale on the 27th of October, 1849, and was struck off to David Ryerson for \$4000. Ryerson sent an agent to attend the sale, and became the purchaser at the special request of Samuel Cassedy, the administrator, and upon the assurance that he should not lose by the purchase. A deed was executed to the purchaser, though he never complied with the conditions of sale, paid no part of the purchase money, and gave no security for its payment. On the 16th of March following the property was exposed by Ryerson to public sale, and struck off to the administrator for the sum of \$4826.25. The conditions of this sale were also abandoned. The vendor accepted less than the sum bid at the sale in payment of

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the purchase money. What abatement in the price was **made** does not appear either by the answer of the defendant or by the evidence. All the evidence given upon **this** point is the statement of the purchaser at the first sale, viz. that the advance he received was sufficient to satisfy him for his trouble. Before the purchase Ryerson **neither** saw the property nor examined the title. While **the** title continued in him he had no communication with the tenant; he never visited the property nor exercised **any** act of ownership over it.

At the sale made by the administrators the property **was** struck off, at the first and only bid that was made, by order of Samuel Cassedy, against the remonstrance of his co-administrator. It was sold for a less price than would have been paid by others who were desirous to purchase, but who were prevented from attending the sale by information derived from one of the administrators, that the sale would not be made upon the first day, but that the terms of sale would be made known, and an opportunity afforded to those desirous of purchasing to make arrangements to comply with the conditions. Cassedy did nothing to enhance the price of the property or encourage bidders, but as far as the evidence shows rather discouraged them. Immediately after the sale he informed his co-administrator that the bid was his—that he could not bear to see the property go into the hands of strangers. At the public sale made by Ryerson, when the property was struck off to the administrator, other persons forbore to bid, from a belief and an understanding prevalent in the neighborhood that the administrator was in fact the owner, and that bids by others would be unavailing. These facts justify the conclusion that Samuel Cassedy, one of the administrators, was in reality the purchaser at the administrators' sale, and that the property was struck off at his instance and for his benefit.

Such sale is invalid. The rule is inflexible, that a sale made by an administrator, or any other acting in a fidu-

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ciary capacity, to himself or for his benefit, will be held void at the instance of the party prejudiced by such sale and the purchaser regarded in equity as a trustee. *Darou v. Fanning*, 2 J. C. R. 252; *Michoud v. Girod*, 4 Howar. 503; *Scott v. Gamble*, 1 Stockt. 235; *Mulford v. Bowen*, Stockt. 797; *Obert v. Obert*, 2 Stockt. 98; *S. C. on appeal*, *Beasley* 423.

It has been held by the Supreme Court of this state that a sale made by an administrator is void at law, or not absolutely void is voidable in a court of law at the instance of the *cestui que trusts* or their heirs. *Winans Brookfield*, 2 South. 847; *Den v. Wright*, 2 Halst. 175; *Den v. McKnight*, 6 Halst. 885; *Den v. Hammell*, 3 Harr. 7. But see *Runyon v. Newark India Rubber Co.*, 4 Zab. 46.

The remedy in equity is to set aside the sale upon equitable terms, and to treat the administrator as a trustee for the parties in interest.

The sale must be set aside upon the usual terms.

Upon the evidence now before the court, I deem it equitable, and shall so direct, unless the complainant show cause to the contrary, that it be referred to a master to take an account of the full and fair value of the farm at the time of the sale by the administrators at a fair sale upon the usual credit, and after deducting from such value the sum for which the defendant has already accounted to the estate of the said Andrew Cassedy, deceased, to take and state an account of what is now due from the defendant on account of such purchase, with interest.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1861.

UPDIKE *vs.* BARTLES and others.

Where a bill has been dismissed or demurrer allowed, and another bill is filed for the same matter, this court will stay proceedings in the second suit till the costs of the former are paid.
Equity in this particular adopts the practice at law.

In a former suit between these parties for the same cause of action the defendants demurred. The demurrer was sustained, and the complainant's bill dismissed. (3 *Stockt.* 133.) The defendants now ask that the proceedings in this suit be stayed until the costs of the former suits are paid, and that after such payment they be allowed time to plead, answer, or demur. The application was sustained by proof of the identity of the cause of action, of the decree for costs in the former suit, and of their taxation, and demand of payment.

Richey, for defendants, cited *Sooy v. McKean*, 4 *Halst.* 86; *Swing v. Inhabitants of Upper Alloways Creek*, 5 *Halst.* 58; *Den v. Sinnickson*, 2 *Green* 198.

Pentz v. Simonson.

THE CHANCELLOR. When the complainant's bill has been dismissed or a demurrer allowed, and another bill is filed for the same cause, this court will stay proceedings in the second suit until the costs of the first suit are paid. Equity in this particular adopts the practice at law. *Holbrook v. Cracroft*, 5 Vesey 706, note b; *Pickett v. Loggou*, 5 Vesey 702; 1 *Newland's Ch. Pr.* 412; 2 *Hoffman's Ch. Pr.* 77.

The rule has its limitations, but this case does not come within their operation. *Sears v. Jackson*, 3 Stockton 45; *Budge v. Budge*, 12 Beavan 385; *Wild v. Hobson*, 2 Vesey 112; *Corbett v. Corbett*, 16 Vesey 410.

Let an order be made that the proceedings be stayed, and that the defendants have time to plead, answer, or demur till the end of thirty days after the complainant shall have paid the costs of the former suit.

PENTZ vs. SIMONSON and wife.

Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable.

The act of 1857, which provides that a *feme covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real estate, or to make contracts in regard to it.

A contract entered into by a married woman for the sale of her estate cannot be enforced.

But equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate.

Winfield, for complainant.

THE CHANCELLOR. The bill is filed to enforce the specific performance, by the husband and wife, of a contract made by and between the wife of the defendant and the

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complainant for the sale and conveyance of the real estate of the wife. The contract is in writing, bears date on the 19th day of January, 1860, and is executed by the parties under their respective hands and seals.

The contract was signed by the wife, in the presence and with the assent of the husband. The consideration to be paid for the conveyance was \$2500, part of which was a mortgage of \$1000 upon the premises. Of the sum of \$1500 to be paid in addition to the mortgage, \$50 was paid at the execution of the contract to the husband in the presence of the wife, and \$500 more was subsequently paid to the husband, as the agent of the wife. The property was conveyed to the wife by deed dated on the 10th of March, 1858. There is no allegation of a tender of the balance of the purchase money to the wife nor of the demand of a deed from her. There is an allegation in the bill that the complainant was ready to pay the balance of the purchase money; that he has frequently applied to the husband, and requested him to execute and deliver a deed according to the terms of the agreement, which he refused to do, but said he would sell to others, but not to the complainant.

Assuming in its fullest extent the doctrine, that a *feme covert* is to be regarded in equity as a *feme sole* with respect to her separate estate, and that she has power to dispose of it at her pleasure, the question remains, will equity enforce the specific performance of her contract for the conveyance of her lands?

It was held by this court, in *Leaycraft v. Hedden*, 3 Green 512, in accordance with numerous authorities there cited, that liabilities voluntarily incurred by the wife would be charged upon her separate estate, but that she could not by her contract make herself personally liable.

There is no doctrine of the common law better settled than that a married woman can enter into no contract or covenant by which she will be personally bound. *Leaycraft*.

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v. *Hedden*, 3 *Green's Ch. R.* 552; *Jackson v. Vanderheyde* 17 *Johns. R.* 167.

This contract it is admitted could not be enforced in court of common law. No damages could be recovered against her or enforced against her separate estate for its violation.

The disability of a *feme covert* to enter into contract has been relaxed by our law in specified cases.

She may, by deed executed and acknowledged pursuant to the statute, convey real estate and bar her right dower; and by the act of March 20th, 1857, (*Pamph.* 485) any married woman of full age who joins with her husband in executing a deed of lands, or any estate therein, may covenant as to the title of said lands, against encumbrances thereon, or in warranting the same and such covenants shall have the same force and effect against her and all persons claiming under her as if she were a *feme sole*.

This act furnishes the strongest legislative construction of the act of 1852, "for the better securing the proper of married women," viz. that it does not by necessary implication vest in the married woman the power of disposing of her real estate or of making contracts in regard to it.

"Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to convey her estate. The agreement by a *feme covert*, with the assent of her husband, for a sale of her real estate is absolutely void at law, and the courts of equity never enforce such a contract against her." 4 *Kent's Com.* 156; *Mari v. Dwelly*, 6 *Wend.* 9; 5 *Day* 496; *Buller et al. v. Buckinham*, 2 *Jac. & Walk.* 412; *Mad.* 261.

The statute provides that a married woman shall convey her lands only by joining with her husband in conveyance, and by an acknowledgment, upon a private examination apart from her husband, that the deed was executed freely without any fear, threat, or compulsion.

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But what protection will the statute afford if a court of equity will compel the wife against her will to execute a deed in performance of a contract made at the instigation or upon the compulsion of her husband in the presence of the purchaser alone?

The *ex parte* evidence on the part of the complainant in this very case exhibits strikingly the danger to which the wife would unavoidably be exposed by the adoption of this doctrine of being stripped of her property at the instance of her husband without her full consent.

The deed was executed by the wife in the presence of her husband and of the agent of the purchaser. The agent testifies that upon his offer being made the wife said, "No, I can't take it." She added, "I have authorized my husband to act as my agent, and I don't know that I have anything to say. But if he consents I would rather not sell the place, but he can do as he pleases." The whole consideration paid on account of the purchase was paid to the husband, as agent of the wife.

It is obvious that if a contract thus entered into by a married woman is to be specifically enforced in equity the statute, so far from operating, as its title imports, "for the better securing the property of married women" will strip them of all the protection with which the jealousy of the common law guarded their rights against the authority and control of the husband. She will in fact be in a more unprotected condition against the control of her husband in regard to her separate property than she is in regard to her estate in the property of her husband.

This very question was decided in this court, more than a quarter of a century ago, in the case of *Wooden v. Morris and Wife*, 2 *Green's Ch. R.* 65. The complainant is not entitled to a decree for a specific performance.

But though equity will not decree the specific performance of a contract entered into by a married woman for the sale of her estate, it will charge her separate property with the repayment of money advanced to the wife at

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her instance and for her benefit or on account of her estate. *Norton v. Turrill*, 2 P. W. 144; *Greatly v. Noble*, 3 Mad. 49; *Stuart v. Kirkwall*, 3 Mad. 200.

It appears from the evidence, that in pursuance of the contract made with the wife, the sum of \$550 was advanced by the complainant to the wife, or to her husband as her agent, on account of the purchase money. Having refused to execute the contract there can be no equity in her retaining the purchase money so advanced upon her contract.

She is in equity as much bound to repay the sum thus advanced as though she had given her bond or note for the repayment of the money.

JONES' EXECUTORS vs. JONES.

Where lands are devised to a woman and her children, she having child living at the time of the devise, the word "children" must be taken as a word of purchase, and the children take a joint estate with the mother. A provision that the devisee shall pay an annuity for the life of another is sufficient at the common law to enlarge a life estate to a fee simple.

A testator bequeathed the rest, residue, and remainder of his real and personal estate to his grand daughter and her children, provided she should pay to S. the sum of \$40 during her natural life, and should paint and keep in good repair the fence around his burial lot. At date of will and at the death of the testator the grand daughter had two children living, a son and a daughter. In a previous part of the will provision was made for the son of the grand daughter, the fund being withheld from him until he attained twenty-one.

Held, that the property included in the residuary clause went exclusively to the grand daughter.

Held further, that her estate in the lands was a fee simple, and not a fee tail.

There was a codicil to the above will, as follows: "I, D. J., make this codicil to my last will and testament, that is, I sell unto C. S. my tavern house and lot, with one-third of the lot behind the barn, for the sum of \$500, provided he, the said C. S., satisfies my executors as to the pay-

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ent of the same." *Held*, that the design of the codicil was to empower the executors to convey the land which the testator had agreed to sell upon the payment by the vendee of the purchase money. It is not competent for the purchaser to show by parol evidence that the scrivener who drew the codicil made a mistake, and that he was to have two-thirds of the lot behind barn.

V. S. Whitehead, for complainants.

THE CHANCELLOR. The residuary clause of the will upon which the first question in the cause arises is as follows: "I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate to my son and daughter Marietta, wife of James Pettigrew, and my children, provided she pays, or causes to be paid unto Sally Smith, daughter of William Smith, deceased, the sum of \$40 each and every year during the natural life of the said Sally Smith, also to paint and keep in good repair the fence around my burying lot in Springfield cemetery."

At the date of the will and at the death of the testator the grand daughter had two children living, a son and a daughter.

According to the familiar rule in *Wildes' case*, where lands are devised to M. and her children, she having children living at the time of the devise, the word children must be taken as a word of purchase, according to its natural import, and the children take a joint estate with the mother in the land devised. *Wildes' case*, 6 *Coke* 16, 2 *Williams on Executors* 937; *Oates v. Jackson*, 2 *Strange* 72.

This construction, like every other, is liable to be controlled by provisions in the will indicating a different intention on the part of the testator; and there are provisions in this will from which it may be naturally inferred that it was not the intention of the testator to divide the land devised between the grand daughter and her children. The devise is made upon the condition that the grand

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daughter shall pay an annuity of \$40 for the life of ~~an~~ other. This alone is sufficient at the common law ~~to~~ to enlarge a life estate to a fee simple. *Baddely v. Leppin*, 29 *Well*, 3 *Burr.* 1533; *Reed v. Hatton*, 2 *Mod.* 25; *Goodridge v. Stocker*, 5 *T. R.* 13; *Andrew v. Southouse*, 5 *T. R.* 292.

The grand daughter is also to paint and keep in repair the fence around the testator's burying lot. These burthens are not a charge upon the estate devised, but they are a personal charge upon the grand daughter, being made a condition of the devise. The grand daughter was the primary object of the testator's bounty. It cannot be presumed that he intended to place her in a worse condition as to the property devised than her children. But this will be the necessary result if they divide the land devised with their mother; for they take their shares free from all encumbrance, whereas she takes hers subject to burthens which may be equal to the whole value of the land devised. As the entire condition upon which the devise is made is to be performed by the grand daughter, the natural inference is that the testator designed that she should take all the property devised.

The testator had also, in a previous part of the will, made a large provision (in proportion to the amount of his estate) for the son of his grand daughter, and had carefully provided that he should not come into the enjoyment of it until he attained the age of twenty-one years, the income in the mean time to be received by his mother. At the time of the devise both of the children were infants of very tender years. The residuary bequests include personal as well as real estate. No provision is made for its investment or guardianship of the property of the infants during their minority, as in case of the legacy specifically bequeathed. The testator, having carefully provided that the infant should not come into possession of the specific legacy till his majority, cannot be presumed to have intended that both the infants should come into the immediate possession of the residuary estate.

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I think, from these considerations, that the testator de-
 ed to give all the property included in the residuary
 se to his grand daughter, and not to divide it between
 and her two living children. And this conclusion is
 accordance with what would be the natural desire and
 ose of the testator, *viz.* that the estate should benefit
 ily all the children of his grand daughter, as well
 e afterborn as those who were living at the date of
 will; for if the word "children" in the residuary
 se be taken as a word of purchase, and not of limita-
 , only the children in *esse* at the death of the testator
 share in the benefit of the devise. They alone will
 to the exclusion of all afterborn children. 2 *Powell*
Dev. 302.

he word "children" being regarded as a word of lim-
 on, the question still remains whether the testator
 l it as synonymous with "heirs" or "heirs of her
 y." Did he intend to give to his grand daughter an
 te in fee or an estate tail?

s to the personal estate, it is immaterial which con-
 ction be adopted, for it is well settled that if the words
 ne devise give an estate tail only in the land they give
 absolute estate in the personalty included in the same
 osition. *Donn v. Penny*, 19 *Vesey* 545; *Dunk v. Fer-*
2 Russ. & M. 557; *Simmons v. Simmons*, 8 *Simons* 22;
Williams on Ex'rs 937, 945, 949.

he grand daughter therefore, in either event, will take
 personal estate absolutely, and she takes also a fee
 ple in the land. The residuary clause is an absolute
 position of all his estate. Its language is, "I give, be-
 ath, and devise all the rest, residue, and remainder of
 real and personal estate to my grand daughter."
 ere is no devise over. It is clear that the testator
 ted with the fee simple in the lands.

It may be remarked moreover, that if this estate of the
 and daughter were construed to be an estate tail, she
 ould by force of the statute (*Nix. Dig.* 196, § 11,) take

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only a life estate with remainder in fee to her childre so that, by construction and by force of the statute, the grand daughter would, in direct violation of the well settled rule of construction, take only a life estate, although required by the will to pay an annuity for the life of another.

II. The codicil is as follows: "I, David Jones, make this codicil to my testament and last will, that is, I sell unto Charles H. Smith my tavern house and lot, with the one-third of the lot behind the barn, for the sum of \$695.00, provided he, the said Charles H. Smith, satisfies my executors as to the payment for the same."

The codicil, though very inartificially drawn, was designed to empower his executors to convey the land which the testator had agreed to sell upon the payment by the vendee of the purchase money pursuant to the contract of sale. Upon the payment of the purchase money by the purchaser on or before the first day of April next the executors will be decreed to convey to Smith the property specified in the codicil.

An attempt is made on the part of the purchaser to show by parol that the agreement made by the testator was to convey not *one-third*, as stated in the codicil, but two-thirds of the lot behind the barn, and that in this particular a mistake was made by the scrivener who drew the codicil.

The evidence is clearly incompetent. The terms of the codicil are clear, and cannot be contradicted or altered by parol. 1 *Greenl. on Ev.* § 275, § 325.

The deed must be made pursuant to the terms of the will, "for the tavern house and lot and one-third of the lot behind the barn," as it was at the date of the codicil, including the part devised to the wife.

It is competent to prove by parol what part of the lot was agreed to be conveyed. This is not contradicting or altering the terms of the will, but merely applying it to its proper subject matter. 1 *Greenl. on Ev.* § 286-7-8.

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The evidence shows that the part of the lot agreed to be conveyed was that part immediately in the rear of and adjoining the tavern lot, and between Washington street and the line of the lot devised by the testator to his widow, and extending westward to the rear of the last mentioned lot, or so far as will constitute one-third in quantity of the entire lot. The conveyance must be made accordingly.

HAYES and WIFE vs. WHITALL and others.

When an annuity is charged on real estate the rule is, that it does not commence until the devisee of such estate is entitled to the possession thereof. This principle is applicable where a sum of money is charged on land in which the testator had only a reversion. The lapse of twenty years without payment or allowance of principal or interest of a legacy will raise a presumption of payment, but such presumption may be overcome by evidence. The wife's right of dower will be protected as against post nuptial mortgages not executed by her.

Dudley and Attorney General, for complainants.

Harrison, Browning, and Carpenter, for defendants.

THE CHANCELLOR. The annuities charged upon the real estate devised to Louis Whitall, by the will of his father, John G. Whitall, commence from the time that the devisee became twenty-one. By the terms of the will, the devisee is to possess the estate at twenty-one, subject to the annuities given to the widow, daughters, and brother of the testator. The rule in such cases is, that the annuity does not commence till the devisee has the estate charged with the annuity in possession. *Ager v. Pool*, *Dyer* 371 b; *Turner v. Probyn*, 1 *Anstruther* 66.

Hayes v. Whittall.

Both Mr. Powell and Mr. Jarman deem the same principle applicable where a sum of money is charged on land in which the testator has only a reversion, and that the money is not to be raised until the reversion falls into possession. 2 *Powell on Dev.* 236; 1 *Jarman on Wills* 757.

That this construction is in accordance with the intention of the testator is very clear from the provisions of the will. During the minority of the devisee, and until his estate vests in possession, the executrix is to apply the rents of the farm to the payment of the annuity to the testator's brother. It is clear that that annuity could not be a charge upon the estate of the devisee. The residue of the income of the farm during the minority of the devisee is to be applied to the support of the testator's wife and children, viz. of the annuitants themselves and of the devisee upon whose estate the annuities are charged. The testator could not have intended that the estate devised to his infant son should be charged with the payment of annuities before he came to the possession of the estate, when he was without other means of paying them and dependent for his support during his minority upon a provision made by the will.

2. The annuity of \$18, bequeathed to the daughters of the testator for five years after the death of Mark Whittall, is not a charge upon the estate devised. The admission in the answer of the devisee upon that subject cannot prejudice the rights of the encumbrancers. It is proper that the answer in this particular should be amended in accordance with the suggestion made upon the hearing.

The lapse of twenty years without payment or demand of principal or interest on account of the legacy will raise a presumption of payment. It is, however, but a presumption, and not conclusive. In *Ex'rs of Wanmaker v. Van Buskirk*, Saxton 693, the situation of the parties was held sufficient to repel the presumption of payment of a mortgage arising from the lapse of more than twenty years. In *Ravenscroft v. Frisby*, 1 Collyer 16, legacies

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arged upon land were, under the circumstances, held to payable notwithstanding the lapse of more than forty ars from the testator's death to the filing of the bill. e first payment on account of the annuity of \$50 fell e in December, 1836. The legacy of \$300 was paya- in May, 1837. The bill charges that, on the thirteenth October, 1846, the complainant gave a receipt for \$360 d by the defendant, Louis Whittall, on account of the nnuities and legacies claimed by the complainant. That 23 were paid on account subsequent to that time. uis Whittall, by his answer, admits that all these pay- ents were made on account of said annuities and lega- s, and alleges that further payments were made, both fore and after 1846, on account of said annuities and gacies.

There does not appear, from the evidence, to have been y specific appropriation of these payments, either by e party receiving or paying the money, or any ground on which the court can appropriate the payment exclu- sively to the annuity to the exclusion of the legacy. They ust be appropriated, as they are claimed by the bill, nd admitted by the answer to have been intended to be, oth to the annuity and the legacy of \$300. There can, herefore, be no presumption of the payment of either on e ground of lapse of time without payment on account.

There can be no question in regard to the annuity to e widow of the testator, as that is acknowledged to ave been paid, and the claim released up to the 25th of arch, 1859.

From the great number of mortgages upon the estate, ill probably be found necessary to sell the entire es- te to satisfy the encumbrances. If so, the land will be ld subject to the charge of the annuities hereafter to ecome payable. The proceeds of the sale will be ap- propriated to satisfy—first the arrears of the annuities and e legacies charged upon the land, and then the mort- age debts in the order of their priority. *Graves v. Hicks*, 1 *Simons* 551; 2 *Roper on Leg.* 1483.

Vanderhaize v. Hugues.

Louis Whittall's wife is living. Her interest in the premises must be protected. She was married on the 23^d of January, 1844. Three of the mortgages were executed prior to that date. The wife did not join in the mortgages executed after the marriage. Her dower right is subject to the encumbrance of the legacies and annuities charged upon the land and remaining unpaid, and also to the encumbrance of the first three mortgages. If the premises subject to her claim will bring enough to satisfy the prior encumbrances they should be so sold. If it is necessary to sell the land clear of the claim of the wife, in order to satisfy the prior encumbrances, the surplus must be brought into court in order that her interest may be properly secured.

NOEL VANDERHAIZE vs. CHARLES A. HUGUES *et ux.*

A deed of conveyance, absolute in its terms, given to secure a loan of money, is a mortgage, and the right of redemption exists although the money was not repaid at the time agreed upon.

Once a mortgage always a mortgage, is a maxim of equity, to which there is no exception.

The right of redemption is an inseparable incident of which the mortgagor cannot deprive himself even by an express covenant.

Boyd and Lyons, for defendant.

Winfield, for complainants.

THE CHANCELLOR. The material facts, so far as regards the present application, are not disputed. The bill charges, and the answer admits, that although the conveyance of the premises in dispute made by the complainant to the defendant is absolute upon its face, it was in reality a mortgage, being given to secure the repayment

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ent of \$3000, by the complainant to the defendant, with interest, in three years from date. The defeasance is in writing, and there is no room for dispute as to its terms. The complainant is entitled to redeem. His bill is filed for that purpose. The injunction was granted to restrain the defendant from conveying the property pending the suit. As the deed is absolute upon its face, a sale of the premises by the defendant to a *bona fide* purchaser, without notice of the defeasance, would vest the title in the purchaser free from the complainant's equity, and deprive him of the right of redemption. *Cornell v. Pierson*, *Halst. Ch.* 484.

It is proper, therefore, that the defendant should be restrained from alienation until the complainant's rights are adjusted and determined.

The defendants' answer is based on the assumption that although the deed was originally intended as a mortgage, yet the title in itself being absolute, and the complainant having failed to pay the debt at the time stipulated in the defeasance, his right to redeem is gone. This is an error. Once a mortgage always a mortgage, is a maxim of equity to which there is no exception. *Newcomb v. Bonnell*, 1 *Vernon* 8; *Clark v. Henry*, 2 *Cowen* 324.

The right of redemption is an inseparable incident, and a mortgagor cannot deprive himself of the right to redeem, even by an express covenant for that purpose. 4 *Kent's Com.* 143; 1 *Vernon* 8; 1 *Powell on Mort.* 116 a; *Rule v. Richards*, *Saxton* 534; *Crane v. Bonnell*, 1 *Green's* 264; *Van Wagner v. Van Wagner*, 3 *Halst.* 27; *Henry Davis*, 7 *Johns. Ch. R.* 40.

The right may be surrendered by the mortgagor, (*Saxton* 534; 4 *Kent's Com.* 143,) or be barred by foreclosure by lapse of time. 1 *Vernon* 8, (*Raithby's ed.*) note 1; 1 *Id. Ch.* 519.

There is no distinction in this respect between a mortgage in usual form and an absolute conveyance made as mere security for money. Every contract for the secu-

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rity of money by the conveyance of real estate to the lender not made in contemplation of an eventual arrangement of property is in equity deemed a mortgage. *Powell on Mort.* 116.

The motion to dissolve the injunction is denied with costs.

JAMES DAVISON vs. JAMES W. DAVISON and others.

It is a well settled rule, that where services are rendered gratuitously or without any view to compensation, but in the hope of receiving a legacy or devise from the person to whom the services are rendered, the person rendering the services can recover no compensation therefor.

A father made a verbal agreement with his youngest son that if he would remain and work his farm, and support and maintain him during his life, that upon his death the son should have the farm. The son remained and worked the farm, for upwards of fifteen years, to the satisfaction of the father, who then becoming displeased with him, conveyed the farm to his two other sons, in consideration of maintenance for life. *Held—*

1. That as it appeared that the complainant's services were rendered to his father not gratuitously, but upon a distinct understanding between himself and his father that he should be compensated for his services, and that the material part of that agreement was that upon his father's death, provided he continued to serve and provide for him during his life, he should receive the homestead farm, that the agreement thus proved was valid in law.

2. That part performance took the case out of the operation of the statute of frauds.

The bill in this case permitted to be amended after final hearing, so as to make the contract alleged agree with that proved.

Leupp, for complainant.

Speer, for defendants.

THE CHANCELLOR. The bill charges, that in the year 1849, the defendant, James W. Davison, being seized and possessed of his homestead farm of one hundred acres,

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of the value of \$6000, and money at interest, amounting to less than \$1000, agreed with the complainant, who is the youngest son of the said defendant, to assure to the complainant the said farm and money, upon the undertaking of the complainant to afford his father and mother a comfortable maintenance for their lives and the life of the survivor of them, and to make advances to his four daughters, viz: to the three eldest \$700 each, and to the youngest \$1200; that by the terms of the agreement the proceeds of the farm, as well as the principal of the money at interest, was to belong to the complainant; that relying upon the faithful performance of the agreement by his father, the complainant entered into the contract, and immediately entered upon the performance thereof.

That he has faithfully performed the said agreement on his part by the cultivation and improvement of the farm, by the payment of the said portions to his sisters, by making permanent and valuable improvements upon the farm, and by affording a comfortable maintenance to his parents till the death of his mother, and to his father since her decease, as long as he was permitted to do so, and that by reason thereof he became justly and legally entitled to the farm upon the death of his father, he continuing, as he is able and willing to do, to afford a comfortable maintenance to his father during the residue of life.

The bill prays that the contract may be established and formed on the part of James W. Davison; that the bill made by the said James W. Davison to his sons, John and Joseph, may be vacated upon just and equitable terms; or if the contract cannot be enforced, that the defendant may be decreed to account for the services of the complainant, and to pay him what may be found upon such accounting, and for an injunction to restrain proceedings at law. Upon filing the bill an injunction was issued, which was afterwards dissolved upon the filing of the defendants' answer, which denied the validity of the bill.

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The evidence, which is very voluminous, satisfactorily establishes the following facts, which are material to a proper understanding and disposition of the rights of the parties. In the year 1850, the defendant, James W. Davison, was seized and possessed of his homestead farm, in the county of Middlesex, containing about one hundred acres, upon which he resided with his wife and some of his children. His four oldest sons had all received advancements from their father, had left home, and were married and settled. James, the youngest son, who came of age in 1844, was unmarried, and remained upon the farm with his father. He continued with him, having charge of the farm, laboriously engaged in its cultivation and management until August, 1859. During this period advances were made by the father to three of his daughters, who were married and had left home, so that previous to September, 1856, his wife having died, he was left upon the farm with his youngest son, James, the complainant, and his youngest daughter, Ida. All his other children were provided for and settled in life. In the spring of 1857, James having married, a small dwelling house was built for his accommodation upon the homestead farm, the father and daughter continuing to occupy the mansion house. In August, 1859, a painful family difficulty arose between the father and the daughter in law, which led to litigation, and ended in the expulsion of the complainant from the farm. On the twentieth of September, 1859, soon after the difficulty with the complainant, the father conveyed to his two sons, Reuben and Joseph, in fee simple his homestead farm with usual covenants. The consideration of the deed, as therein expressed, is natural love and affection, the sum of \$5 paid by each of the grantees, and an engagement on their part to maintain him for the residue of his life. The grantees executed an agreement of even date, in consideration of the conveyance, to maintain their father for the residue of his life, to pay the expenses of his last sick-

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and his funeral expenses, including a decent headstone to be placed at the head of his grave. On the day the date of these remarkable instruments, a notice served upon the complainant by his father, or in his name, in these words.

To Mr. James Davison, junior.

Take notice that your service is not wanting on my land now conveyed away to my two sons Reuben and John Davison and I have give them immediate possession of the same and if you continue thereon I shall hold you as a trespasser, and proceed against you according to law and further I shall not want any more of your help either in my crop at present on said farm."

Refusing to give up possession an ejectment was brought by the brothers. The complainant sought to protect himself by injunction, but the defendants, by their answer, denying all the equity of the bill, the injunction dissolved, and the complainant was turned out of possession. And thus, after fifteen years' labor from his beginning his majority in his father's service, during nine of which he had the entire control and management of the farm, engaged faithfully and laboriously, and as appears by the evidence, to his father's entire satisfaction, he received no compensation whatever for his services beyond a bare subsistence, he is turned out of his land without a dollar's compensation, and so far as appears without the means of subsistence. And as if to deprive him of the possibility of obtaining redress, the title to the farm is immediately conveyed to two of the complainant's brothers, the goods and chattels converted into money, and thus the entire real and personal estate of the complainant is placed beyond the reach of legal process. The case, in its leading features, is a most extraordinary one. The complainant, as appears not only by the testimony of numerous witnesses, but from his express recital in the deed to his sons, Reuben and Joseph, was in old age, infirm, and unable to take care of himself. He needed the services

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and assistance of his children. He had long since made advancements to all his children except his youngest son and daughter, who remained at home with him attending to his affairs and ministering to his comfort. By his will, executed in September, 1856, he declared that he had given all his sons except the complainant their portions in his personal and real estate, and had made advancements to his elder daughters, and therefore gave the whole of his real and personal estate to his two youngest children, who were at home with him, the farm being devised to the complainant. And yet within three years thereafter, without any failure of service on the part of the complainant, he is turned out of possession without remuneration for his services, and the entire real estate of the father transferred to his brothers. Whether this change of purpose was produced by the painful difficulty between the father and the wife of the complainant or by the contrivance of the sons who have obtained possession of the property, or by the efforts of the complainant to defend his wife's character, is not material for the purpose of this inquiry. That it is a case of peculiar and extreme hardship upon the complainant cannot be questioned. But does he stand in a situation which entitles him to relief in this court? It is insisted, on the part of the defendants, that the services of the complainant were rendered to his father gratuitously, and upon the mere hope of having some provision made for him by his father's will. If so he is clearly entitled to no relief. The rule is well settled, that where services are rendered gratuitously without any view to compensation, but in the hope of receiving a legacy or devise from the person to whom the services are rendered, the person rendering the services can recover no compensation. *Osborn v. Governors of Guy's Hospital*, 2 Strange 728; *Le Sage v. Coussmaker*, 1 Esp. 187; *Little v. Dawson*, 4 Dal. 111.

The complainant claims, and I think the evidence satisfactorily proves, that these services by him were not ren-

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ed gratuitously, but upon the distinct understanding between the father and son that the son should receive the farm upon the father's death. It is expressly proved by two witnesses (in addition to the testimony of the complainant himself) that the father declared that he had agreed with James that he should have the farm upon his death. It is proved, moreover, that the father declared, making of the security of the provision made for his son, that the will could not be broken, that a will was as good as a deed, and that the reason that he did not make a deed was that he had been advised by a friend not to put his property out of his hands in his lifetime. This evidence derives strong confirmation from the fact that the father was in a situation to need the services of the son, that all his other sons had been advanced and had received all the provision which he designed to make for them from his real or personal estate, that he had in fact devised the farm to the complainant; that that will was in existence at the commencement of this difficulty, and appears by the evidence, has been destroyed during the progress of the suit, although the father, by his answer, expressly denied that any such will had ever been made, and lastly from the fact, that as soon as the friendly intercourse between the complainant and his father was broken off the father deeded the farm to his sons, Reuben and Joseph, upon almost the identical contract which the complainant alleges his father some years previously had made with him. If the fact that the services of the complainant were not performed gratuitously needs further proof it will be found in the fact, clearly proved by the defendant's own witnesses, that he was offered by his father \$2000 to abandon an action for slander and in satisfaction of his interest in the farm. If he had no contract with his father and no claim for his services it is difficult to understand why so large a sum should be offered in satisfaction of his claim.

I entertain no doubt, from the evidence, that the com-

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plainant's services were rendered to his father not gratuitously but upon a distinct understanding between himself and his father that he should be compensated for his services, and that the material part of that agreement was that upon his father's death, provided he continued to serve and provide for him during life, he should receive the homestead farm.

The agreement thus proved is valid in law; *Jacobson v. Ex'rs of Legrange*, 3 J. R. 199; *Paterson v. Paterson*, 13 J. R. 379; *Chitty on Con.* (9th ed.) 557, and cases cited in note 1, and may be enforced in equity; *Gary v. Ex'rs of James*, 4 Dess. 185; *Johnson v. Hubbell*, 2 Stockton 332.

That the contract was by parol and not in writing, while it greatly increases the difficulty of proving its terms, constitutes no valid objection to its enforcement. There has been a part performance on the part of the complainant. He served his father several years upon the faith of the contract, and as the evidence shows faithfully and to his father's satisfaction. Part performance takes the case out of the operation of the statute of frauds.

The contract is not proved precisely as laid in the complainant's bill. The complainant charges that by the agreement he was to receive not only the real estate, but also the personal estate of his father upon making certain advances to his daughters. The evidence, so far as the personal estate is concerned, does not prove this contract. The bill must be amended so as to conform to the contract as proved. It may be done at this stage of the cause after hearing on bill, answer, and evidence. *Bellows v. Stone*, 14 New Hamp. 175. No embarrassment can result from it. It is not a case where the defendant sets up and proves a different contract from that relied on by the complainant. There the defendant is entitled to a decree for the performance of the contract as he proves it. *Story's Eq. Pl.* § 394.

Here the defendant has utterly denied the existence of

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ny contract. The contract, as proved, is variant from that charged in the bill. Before decree there must be an amendment. *Story's Eq. Pl.* § 394, note 2.

Upon the bill being amended the court will decree that the contract, as proved, be established; that the complainant, upon the performance of the agreement on his part, or upon his readiness to perform if prevented by the acts of the defendants, will be entitled to the farm upon the death of the father; that the deed executed by the father to his sons, Reuben and Joseph, be set aside as fraudulent and void as against the complainant, and that the defendants, and each of them, be restrained from aliening, charging, or encumbering the said farm.

It is eminently desirable that this controversy should be amicably adjusted, and the court repeats the hope expressed on the argument, that a settlement may be effected between the parties without further action on the part of the court. The father is entitled to the enjoyment of the farm during his life. No present decree for the specific performance of the contract can be made. The complainant is entitled to the farm only upon the death of his father. By the terms of the contract, is to have the management of the farm and to provide for his father during his life. If the father refuses to accept the services of the complainant, and no amicable adjustment can be made, further directions will be given for the management of the farm and the support of the father during his life.

JOHN T. MARSH vs. JONAS S. LASHER and wife.

A decree will not be opened on the unsupported affidavit of a defendant that the complainant verbally agreed not to prosecute the action. Where a defendant is asking, as a matter of favor, to be permitted to defend, neither a court of law or of equity will grant the request if the defence rests on the ground of usury.

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Usury is not regarded as an equitable defence.

A loan made at seven per cent. on 8th May, 1856, the lender living in Essex, and the borrower in Middlesex, the land lying in the latter county held not to be usurious as the law then stood.

Shafer, for complainant.

Leupp, for defendants.

THE CHANCELLOR. A final decree for foreclosure and sale of mortgaged premises was made in this cause on the 17th day of November last. A *fieri facias* was thereupon issued, and the premises advertised for sale on the 4th of April. The sale having been adjourned, on the 18th of April, an order was made requiring the complainant to show cause why the execution should not be set aside, the decree opened, and the defendant admitted to answer. The order was based upon an affidavit of the defendant stating that after the service of the subpoena the complainant had promised a stay of all further proceedings, and that he had a full and legal defence to make to the bill upon the merits.

The application rests upon two grounds.

1. That he was prevented from filing an answer by the fraudulent conduct of the complainant.
2. That he has a defence to the bill upon the merits.

The defendant swears that the complainant told him, soon after the subpoena was served, that he would stay all further proceedings in the suit, and give the defendant an opportunity of making sale of the premises. The proof rests solely upon the affidavit of the defendant. There is no concurring testimony and no corroborating circumstance to sustain the averment. An enrolled decree, regularly made, will not be opened upon the unsupported affidavit of a defendant that the complainant verbally agreed not to prosecute the action. The rights of the complainant under the decree ought not to be disturbed except upon more satisfactory evidence. The rule of our

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reme Court has long been to disregard all admissions
greements made out of court by parties or their at-
eys in respect to the conducting of the suit, and not
iced to writing and subscribed by the persons making
The policy of the rule is obvious. It points to the
minent danger of making the rights of parties in the
ducting of a suit depend upon the memory, the truth-
ess, or the accuracy of an opponent whose feelings or
ions are excited by self-interest and the excitement of
gation. The principle will apply with greater force
inst permitting a party to rid himself of a decree regu-
y obtained by his statement of the admission of an
ersary, made months previously, resting solely in his
mory.

The statement of the defendant is not only uncorrobo-
ed by any other evidence in the case, but it is expressly
ied by the complainant. It is remarkable, moreover,
t the defendant was present on the day on which the
erty was first advertised and offered, and neither then
before made any complaint of fraud or surprise in ob-
ing the decree. There is a total failure of evidence
support the first ground of complaint, *viz.* that the de-
e was obtained by fraud or surprise. If admitted to
wer, it must be on the second ground, *viz.* a defence
on the merits. The court lends a ready ear to applica-
is for relief if the defendant has by misapprehension
mistake been deprived of the opportunity of making
ence.

The only defence disclosed by the evidence is an alle-
on that the mortgage is founded on a usurious cou-
t. The decided objection to this ground of relief is
usury is not regarded as an equitable defence, and
where a defendant is asking as a matter of favor to
permitted to defend on the ground of usury, neither a
rt of law or of equity will grant the favor. It is too
to discuss the reason or policy of the rule. It is as
l settled as any rule of practice can be, and there is no
d reason to disturb it.

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But if the defence were admissible the evidence totally fails to prove that the contract is usurious.

The bond and mortgage are dated on the 8th of May, 1856, and bear interest at seven per cent. The complainant then lived in Essex, the defendant in Middlesex. The land is in Middlesex. As the law stood at the date of the contract, the parties were authorized to agree for interest at seven per cent. *Nix, Dig.* 374, § 10.

It was immaterial where the land lay or where the contract was in fact made.

Upon the face of the written instruments there is no usury in the contract. The defendant alleges that the loan was made in pursuance of a contract made some months previous to the date of the mortgage, and at a time when both parties lived in Middlesex. The fact is denied by the complainant, but if it were established it would not prove the mortgage usurious. Admit that the parties entered into an agreement for a loan of money at a usurious rate of interest on the first of March, both parties then living in Middlesex, the contract was simply void—neither party was bound by it. On the 8th of May, a valid contract was entered into; the bond and mortgage were given for a lawful rate of interest. It will never be presumed that a lawful contract was entered into in pursuance of a previous corrupt and unlawful agreement.

The motion to open the decree is denied and the rule to show cause discharged with costs. All the depositions in relation to the value of the premises must be suppressed as irrelevant. In taxing the costs no allowance will be made for that part of the testimony.

Pence v. Pence.

ARISSA PENCE and others vs. JACOB PENCE and others.

A bill filed for an account and to execute the trust created by a deed absolute on its face, but which in point of fact was executed upon certain trusts, viz. to satisfy the debts of the grantor, and then for the use and benefit of his family, the widow and heirs of the grantor are not only proper but necessary parties.

Persons whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties.

Shipman, for complainants.

Vliet, for defendants.

THE CHANCELLOR. This bill is filed by the widow and heirs at law of Martin Pence, deceased, to obtain relief against a conveyance executed by Pence in his lifetime to a defendant, Jacob Pence.

The grounds of demurrer are—

1. That the widow and heirs are improperly joined as complainants.
2. That the bill prays an account of rents and profits the lifetime of Martin Pence which belong to the administrator, and not to the widow and heirs.
3. That the bill seeks to recover the proceeds of a note belonging to Martin Pence which was collected and misappropriated by the defendant.
4. That the bill prays an account not only of the rents and profits of the land and of the proceeds of the note, but for all other moneys collected by the defendant belonging to Martin Pence.

The demurrer appears to have been filed under a misapprehension of the real purpose of the bill. If the object of the bill be to set aside the deed as fraudulent and void on the ground of the mental imbecility of the husband, or of actual fraud practised upon the wife to induce her to assign her dower; if the relief sought by the widow

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and heirs and the grounds of that relief are entirely distinct; if the widow and heirs of Martin Pence are seeking an account of the personal property of Martin Pence with a view to its recovery, the bill is obnoxious to all the objections raised by the demurrer. It is bad for multifariousness, and the complainants, as the widow and heirs of Martin Pence, are seeking relief to which his administrators are alone entitled.

But the real purpose of the bill is not to avoid the deed, but to establish trusts under it, and to have those trusts executed. The charge is, that the deed, though absolute upon its face, was in fact executed upon certain trusts, viz. to satisfy the debts of the grantor, and then for the use and benefit of his family; that the debts have been satisfied by the rents and profits of the real estate and by certain moneys of the grantor received by the trustee, and that the *cestui que trusts* are consequently entitled, under the terms of the agreement, to have an account taken and the trust executed. To the bill, in this aspect, the widow and heirs of the grantor are not only proper but necessary parties. All persons whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties. 1 *Daniels' Pr.* 240, and note 2.

And for the purpose of having the alleged trusts executed, it is necessary that an account should be taken not only of the rents and profits of the real estate but also of all the moneys of Martin Pence received by the defendant, either in the lifetime of Martin Pence or since his death, and which in equity ought to be appropriated for the payment of his debts; not that the personal property thus received may be recovered by the complainants, but that it may be ascertained whether it has been applied toward the payment of debts, and whether the trust has been executed.

The bill is not carefully drawn, and there are expressions, both in the statements and in the prayer of the bill,

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which seem to militate against the foregoing view of its scope and design; but they do not appear to me materially to affect its character, and they certainly do not operate to render the bill available for any other purpose than that stated.

The complainant will not be permitted, under the present frame of his bill, either to have the deed set aside as fraudulent or to recover personal assets of Martin Pence which came to the hands of the defendant in his lifetime. If such is the design of the complainant the bill should be amended.

The demurrer is overruled.

WRIGHT vs. MCKEAN and others.

In a foreclosure suit, when an answer has been filed by a junior encumbrancer, which neither denies the amount claimed nor the order of priority, an order of reference cannot be made, unless by consent, without setting the cause down for hearing.

C. S. Green, for complainant.

Beasley, contra.

THE CHANCELLOR. On a bill to foreclose, an answer was filed by a junior encumbrancer or a party claiming some equity subsequent to that of the complainant. The order of priority is not disputed, nor does the amount claimed as due appear to be denied. A decree *pro confesso* was taken against the other defendants, and an order of reference made to a master, without setting down the cause for hearing and without the consent of the defendant who filed an answer. A motion is now made to substitute a new master for the one named in the original order. It is objected that the original order was irregular, and that consequently no substitution should be made.

Wright v. McKean.

The only point upon which an opinion is asked is, whether upon a foreclosure bill, when an answer is filed by a junior encumbrancer, which neither denies the amount claimed to be due nor disputes the order of priority, an order of reference may be made without setting the cause down for hearing and without consent. The statute requires that when an answer is filed the complainant shall either file *exceptions* or a *replication*, or set down the cause for hearing upon bill and answer. *Nix. Dig.* 91, § 28.

When no answer is filed, and a decree *pro confesso* is taken against the defendant or against all the defendants, and the whole amount intended to be secured by the mortgage is due, no order of reference is necessary unless specially ordered, nor is it necessary to set the cause down for final hearing. *Rule 14, § 3.*

Rule 14, § 4 and *§ 5*, both relate to setting down the cause for hearing upon the coming in of the master's report after the order of reference has been made. Neither of them relates to the making of the order of reference nor in any wise affects the question now under consideration.

Rule 8, § 3, regulating the proceedings in case of an infant defendant, where no answer, plea, or demurrer is filed on his behalf, authorizes a reference to a master only where a decree *pro confesso* has been taken against all the other defendants, or upon filing the consent in writing of such defendants to the reference.

There is nothing in the rules which does or can at all interfere with the plain requirements of the statute. Where an answer is filed by any defendant there can be no reference to a master without setting down the cause for hearing, or without the consent of the defendant by whom the answer is filed.

It is asked why set the cause down when the amount claimed as due upon the complainant's mortgage is not denied and there is no dispute as to the order of priority. The answer is twofold.

Snover v. Snover.

1. Because the statute requires it.
2. Because although there may be no dispute as between the defendant who answers and the complainant, and no question as to priority, there may be important questions involved touching the rights of codefendants, which the court, in its discretion, may and often ought to dispose of before the order of reference is made.

The motion to substitute a master must be denied; the order of reference heretofore made must be set aside, and the cause set down for hearing, as required by the statute.

SAMUEL SNOVER vs. ELIZA SNOVER.

Alimony.

Application to increase or diminish the allowance may be made by petition.

Kennedy and Williamson, for petitioner.

Sherrerd, contra.

THE CHANCELLOR. A divorce from bed and board between the parties in this cause was granted, on the application of the wife, at October term, 1854. The decree allows alimony to the wife, and directs that the youngest child should remain with the mother, and that the father should pay seventy-five cents a week to the mother for the maintenance, education, and clothing of the said child. Leave was given to either party to make application from time to time for a change in the allowance. The allowance made to the wife for alimony and for the support of the child were declared to be a lien upon the real estate of the husband in this state, and he was also required to give further reasonable security for the punctual payment of the allowance.

The husband has now filed a bill to be relieved from

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the further payment of the allowance for the support, education, and clothing of the child. The mother has also petitioned for an increase of the allowance. This case was fully considered by the Chancellor, and upon a careful consideration of the evidence adduced upon the present application I see no ground to change the allowance made at the time of the decree. There has been no such change in the condition of the child or in the circumstances of the parents as to warrant either a change in the amount or a discontinuance of the allowance.

The principal grounds of the application on the part of the father are the incapacity of the mother to act as the guardian of the daughter; that the child was taken from the duties of housekeeping and put to labor in the field, at work suitable only for the male sex; that her education has been neglected, and that she has actually earned her own living. These charges are fully met and overcome by the evidence in the case. I am satisfied that there is no reason for withholding the allowance on either of these grounds. The omission to send the child to school for a portion of the time has been satisfactorily explained. Her employment and education has been adapted to her situation and condition of life. There is nothing in the evidence showing that she had been improperly employed in services not suitable to her age and sex.

Another ground, and that most seriously urged upon the argument, was that the child was now of an age to choose her own guardian, and that she should be permitted to live with her father or her mother as she might prefer; that so long as the allowance to the mother is continued the child is virtually deprived of the freedom of choice. If there was any evidence that the child desired to live with the father, and that he was a proper person to have the care and charge of her, there might be weight in this suggestion. But so long as she is satisfied to remain with her mother, it is not perceived that the

Cook v. Cook.

allowance for her support should be discontinued, or that its continuance in any wise interferes with her freedom of choice or with the just rights of the father. There is moreover this serious objection to relieving the father on this ground from the allowance. He is not a resident of this state. If he should be relieved from the payment of the allowance, and the securities now held by the court for its payment should be discharged, there would be no mode of compelling the father to support the child in case it should become necessary to make such order in future. In case of sickness or disability she would be thrown entirely upon the mother for her support.

On the other hand, I see no reason whatever for an increase of the allowance. The evidence does not show such an increase in the cost of maintaining and educating the daughter as to justify an increase of the allowance.

Both motions are denied without costs on either side. The injunction heretofore granted to restrain the collection of the allowance must be dissolved.

From the evidence now before the court, I incline to the opinion that if the daughter continues in health the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time. No bill is necessary for that purpose. The application may be made by petition.

ANN COOK vs. WILSON COOK.

When a cause in a divorce suit is referred to a master, it is irregular to examine a witness before another master.

A divorce will not be decreed upon proof that the husband went away and lived apart from his wife. A mere separation cannot be considered a desertion within the meaning of the statute.

 Massaker v. Massaker.

THE CHANCELLOR. 1. One of the material witnesses was not examined before the master to whom the cause was referred but before another master. This was illegal and the evidence so taken is incompetent upon the hearing. Aside from the evidence of this witness, there is no legal proof of the marriage.

2. There is no proof whatever of a "wilful, continued and obstinate desertion" within the meaning of the statute. A divorce will not be decreed simply upon evidence that the husband went away and lived apart from his wife. Where there is no evidence except of a mere separation, it cannot be considered an obstinate desertion within the meaning of the statute. Opinion of Chancellor Williamson in *Drake v. Drake*, cited in *Halst. Dig.* 385.

The principle is well settled, and is constantly and uniformly acted upon.

The evidence in this case merely shows that the husband, some years since, left his family in this state, and went to the state of Indiana. For what purpose or under what circumstances he left the state, or why he has not returned, is not attempted to be shown. The evidence is too loose and unsatisfactory to warrant a decree in favor of the complainant.

The bill must be dismissed.

 MASSAKER vs. MASSAKER.

The personal estate alone is liable for the payment of legacies, unless the land is by the will made chargeable either expressly or by clear implication.

Parol evidence of the declarations of the testator is not admissible to show an intention to charge legacies upon the land.

That the personal estate is not sufficient to pay the legacies will not of itself make the land chargeable.

Massaker v. Massaker.

Woodruff, for complainant.

Barkalow, for defendant.

THE CHANCELLOR. The only question raised by the defendant's answer is, whether certain legacies under the will of John Massaker, jun., are a charge upon the real estate of which he died seized, and which is not disposed of by his will.

The personal estate alone is liable for the payment of legacies, unless the land is by the will made chargeable, either expressly or by clear implication. *Lupton v. Lupton*, 2 Johns. Ch. R. 614; *White v. Ex'rs of Olden*, 3 Green's Ch. R. 343.

There is nothing in the will of the testator that can by possibility create a charge upon the land. It is not so alleged or suggested in the answer. But it is sought to establish an intention on the part of the testator that the legacies should be charged on the real estate whereof partition is sought to be made.

1. From the parol declarations of the testator.

2. From the extent of his legacies and the disposition of his property, taken in connection with the character and value of his property.

1. Parol declarations of the testator are not competent to control the construction of his will, even when they are clearly proved by competent evidence. There is in this case no competent proof that such declarations were made. No witness has been examined who professes to have heard such declarations from the lips of the testator himself.

2. The bulk of the testator's property consisted of a house and lot, which was devised to one of his sons, and a note for eight hundred dollars, which was specifically bequeathed. The balance of his personal property was insufficient to pay his debts and funeral expenses. Besides the specific bequest already mentioned, the testator be-

Massaker v. Massaker.

queathed several pecuniary legacies, amounting to \$550. At the date of his will, which was a few days before his death, the testator had no estate, real or personal, for the payment of the legacies, except certain lots, which are not devised or mentioned in the will, and which it is now insisted the testator intended should be sold to carry into effect the purposes of his will. There is no power given to his executors to sell the real estate—no direction that it should be sold—and no intimation of the testator's will in relation to the subject.

Where, from the language of a will, the intention of the testator is doubtful, the circumstances by which he was surrounded, the condition of his family and the nature of his estate have been sometimes resorted to to ascertain the true construction of the will. In *Bootle v. Blundell*, 1 Mer. 216, it was held that the respective value of the real and personal estate, which is the only material circumstance relied on in this case, could not be called in to assist in explaining the will; and although upon this point there is much conflict in the authorities, the evidence having sometimes been held admissible, such circumstances can never in themselves supply an omission in the draft of a will or create a charge which is not to be found in the will itself. Whatever probabilities they may suggest as to the intention of the testator, they cannot affect the plain language of the will, nor establish an right under it.

The debts alone, not the legacies, are a charge upon the real estate.

Blair v. Porter.

BLAIR and HUNT vs. PORTER and others.

A bill of interpleader will not be sustained unless there is a well founded apprehension of danger from conflicting claims to the fund in dispute. Under the circumstances of this case the bill was retained, but no costs allowed out of the fund.

Shipman and Depue, for complainants.

Annin, for defendants.

THE CHANCELLOR. In March, 1856, Blair and Hunt, the complainants, were indebted to William Burger, of the city of New York, in the sum of \$221.48, the debt maturing on the 13th of August of that year.

On the 9th of April, 1856, the debt was attached in the hands of Blair and Hunt by virtue of a writ of attachment issued out of the Supreme Court of this state, at the suit of Charles S. Brown, against Burger, as a nonresident debtor. On the 16th of March, 1857, judgment final was rendered in the attachment suit in favor of Brown against Burger for \$1564.61 of damages, besides costs of suit, which judgment remains in full force unsatisfied of record. On the 12th of April, 1856, three days after the service of the attachment, Burger made a general assignment of all his property to L. D. Fredericks for the benefit of his creditors, and on the 26th of April the assignee claimed the debt due from Blair and Hunt by virtue of the assignment, and demanded payment thereof on its maturity.

On the 31st of March, 1856, prior to the service or issuing of the writ of attachment at the suit of Brown, Burger, for a valuable consideration, assigned all his right and interest in the account against Blair and Hunt to James L. Porter, by virtue of which assignment the equitable interest in the debt passed to the assignee.

There were thus three distinct claimants for the debt due

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from Blair and Hunt to Burger, *viz.* Brown, the attaching creditor, Fredericks, the general assignee, and Porter, the special assignee, all of whom presented their claims to the debtors before the debt became due.

On the 24th of September, 1856, Fredericks, the general assignee of Burger, wrote to Blair and Hunt, on behalf of Porter, the special assignee, as his attorney, claiming the debt, with interest, as due to Porter, and asking whether it would be paid without suit. This letter, though it contains no disclaimer of his right to the debt under the general assignment made to him by Burger, appears to have been regarded as a virtual abandonment of that claim. It was certainly groundless, as the assignment was made subsequent to the levy of the writ of attachment. Fredericks was therefore not made a party to the suit. The bill of interpleader was filed against Burger, the original debtor, Brown, the attaching creditor, and Porter, the special assignee. Burger has answered, and disclaimed all interest in the debt. Porter, by his answer, claims the debt by virtue of the assignment from Burger and also by virtue of a compromise between himself and Brown the attaching creditor, by which it was agreed that the attorney of the plaintiff in attachment should act as the attorney of both parties, collect the claim, and pay the claimants their respective portions, according to the terms of the compromise. The existence of this agreement is fully proved. Brown, the attaching creditor, has not answered. As to him, the bill has been or may be taken as confessed. So far as the rights of the parties before this court are concerned, this is an admission, on his part, that his claim was unfounded, and that he has no right to the fund. *Badeau v. Rogers*, 2 Paige 209; 3 Daniell 1763.

Upon this state of facts there is no dispute whatever between the defendants as to the right to the fund in question. Porter is clearly entitled to it.

The only question in the cause is, was the bill properly filed.

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It is evident that prior to the compromise between Brown and Porter there were conflicting claims to the debt, and the correspondence of the debtors evinces an entire willingness to pay the amount due to the claimant entitled to receive it. Subsequent to the compromise between the claimants, on application for payment, the existence of the debt was denied, and thereupon a suit was commenced in the name of Burger, the original creditor, to the use of Porter for its recovery. To this suit Blair and Hunt appeared, and negotiations were entered into between the respective attorneys for a settlement. The negotiation was broken off in consequence of a misunderstanding or disagreement between the attorneys, and thereupon this bill was filed for an injunction to restrain the suit at law and for the parties to interplead. It is apparent, from the evidence, that there was no question in regard to the party entitled to the money. The real difficulty was whether Blair and Hunt were liable for interest upon the debt and for costs of suit. It was in fact agreed to submit these questions to the decision of the Supreme Court, and the negotiation was broken off upon a disagreement in relation to the state of the case. An indemnity was indeed asked for, but receipts were offered, and the evidence warrants the belief that the fact of the compromise and the right of the attorney to give receipts which would operate as a perfect indemnity were fully understood. Under these circumstances the filing of the bill was unnecessary. No injunction was needed to restrain the suit at law. The existence of the attachment was a perfect defence at law to that action. 1 *Chitty's Pl.* 513, 521, 524. The defendants were exposed to no hazard of being subjected to damages, interest, or costs. Nor would it seem that there could have been any well founded apprehension of danger from conflicting claims to the fund. The attorney of the plaintiff was in fact the attorney of all the parties, and if his receipt was not satisfactory it is obvious that proper indemnity would have been

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given. Under these circumstances, aside from all technical objections (which are waived by the nature of the pleadings), the bill, perhaps, in strictness should be dismissed.

Yet it is obvious that such disposition of the case would be prejudicial to the interests of both parties and would defeat the ends of justice. There is in reality no ground of dispute between the parties. The existence of the debt is admitted. The principal due is voluntarily brought into court by the complainants. No interest can be recovered upon it. The fund has been locked up in the hands of the debtors from the time it became due by way of foreign attachment. A garnishee is not liable for interest on the amount attached while he is *bona fide* restrained from payment by the legal operation of a foreign attachment. *Fitzgerald v. Caldwell*, 2 Dall. 215; *Prescott v. Parker*, 4 Mass. 170; *Sellick v. French*, 1 Am. Lead. Cases 527, note.

Upon the case made before the court Porter is unquestionably entitled to the money. The fund is in court and under its control. All the necessary parties are before the court. Their rights may be definitely settled and fully protected by a final decree.

The effect of dismissing the bill would be to leave the parties, after five years of fruitless controversy, with nothing settled but liability for costs, to commence litigation anew.

The bill will be retained, but without the usual allowance to the complainant of costs out of the funds—the ~~the~~ under the circumstances, would be inequitable. The fund will be decreed to be paid to Porter. Under the circumstances, there is no propriety in the parties actually interpleading and no necessity for a reference.

Brown v. Fuller.

CHARLES BROWN and others vs. WALTER FULLER and
others.

- A formal traverse of material matters contained in the bill is not sufficient to dissolve an injunction. The answer must be full and satisfactory.
- A creditor, having exhausted his remedy by execution at law, has a right to come into a court of equity to set aside a conveyance alleged to have been fraudulently made by his debtor.

Williams, for complainants.

Frelinghuysen, for defendants.

THE CHANCELLOR. The defendants move to dissolve the injunction upon these grounds, *viz.*

1. For want of equity in the bill. It is urged that the bill is multifarious, and that if the facts charged therein are true the complainant has a full and adequate remedy at law. The objection is not well taken. The complainants have a judgment at law against Fuller, upon which an execution has been issued and returned unsatisfied, and he has no other visible property out of which satisfaction of the judgment can be obtained. The remedies at law have been exhausted. An *alias writ of fieri facias* has been issued, and levied upon real estate in the possession of the defendant, Fuller, and which was recently owned by him, but the legal title to which was transferred from Fuller to his son a short time before the recovery of the complainants' judgment. The property, moreover, is largely encumbered by mortgages and by a judgment given prior to the alienation of the title by Fuller.

Under these circumstances, the execution creditor is entitled to come into equity for relief. The bill is sustainable under the ordinary jurisdiction of a court of equity to set aside fraudulent conveyances and other obstructions to an execution at law, and to make the holders

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of all such conveyances and encumbrances parties to the suit. *Cook v. Johnson*, 1 *Beasley* 51; *Boyd v. Hoyt*, 5 *Paige* 65; *Reade v. Livingston*, 3 *Johns. Ch. R.* 481; *Beck v. Burdett*, 1 *Paige* 305; 6 *Paige* 526; *The Chataugue County Bank v. White*, 2 *Sel.* 236; *Same v. Risley*, 19 *N. Y. Rep.* 369; *Bailey v. Burton*, 8 *Wend.* 339; *McElwain v. Yardley*, 9 *Wend.* 549.

2. Because the equity of the bill is fully denied by the answers.

As to a part of the defendants, this objection must prevail. The answer of the bank is a full and explicit denial of the equity of the bill, so far as regards the validity of their claim, and the injunction, as against them, must be dissolved. But the answer of the other defendants is by no means so satisfactory. The defendants have, in several material particulars, satisfied themselves by a more formal traverse of the charges of the bill in the precise phraseology in which the charges are made. This is not enough.

In regard to the mortgage of Shotwell, the defendants, Fuller and Shotwell, answer that the mortgage was not given for the purpose of fraud, as is alleged by said complainant, but was given to secure certain indebtedness from Fuller to Shotwell, particularly specified in the answer. The mortgage was given for \$10,888.78, which is alleged to be an error, the real indebtedness being but \$10,770.87. With the exception of a small balance on account, this indebtedness is alleged to consist of eleven promissory notes, the aggregate amount of which is \$4287.58, and the interest thereon \$6000. These notes all matured from February to June, 1842, over seventeen years before the giving of the mortgage. Not one dollar of interest appears to have been paid upon them. This transaction is in itself suspicious and calculated to awaken inquiry as to the *bona fides* of the indebtedness, as well as to its actual existence. What was the cause of this indebtedness? To say that the consideration of the mortgage was the principal and interest due on eleven

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promissory notes, is no answer to the inquiry. *Latham v. Lawrence*, 6 Halst. 325. The question remains, what was the consideration of the notes? and why were they suffered to remain outstanding for seventeen years without the payment of either principal or interest, until the complainant has commenced his suit and about to recover his judgment? Fraud and want of consideration were directly charged by the bill in relation to this mortgage, and it certainly behoved the defendant to give a more satisfactory explanation of the real character of the transaction.

The answer in relation to the judgment of Thorp is equally unsatisfactory. The defendants, Fuller and Thorp, "deny that only a small part of that sum was actually due to said Thorp, and also deny that said confession of judgment was made for the purpose of defeating said complainants in the collection of their debt by placing an additional encumbrance on the property of said Walter Fuller." But Thorp does not, by his answer, allege that the whole amount of the judgment was actually and honestly due, nor does he state the consideration of the judgment or the ground of the indebtedness. Upon these all important points Thorp is entirely silent, and leaves the answer to rest entirely upon the conscience of Fuller alone.

The question at this stage of the inquiry, it must be borne in mind, is not whether these claims may or may not prove upon a final investigation to be well founded, but whether the answer is of such a character as to justify a dissolution of the injunction. I am clearly of opinion that it is not.

3. The third ground upon which the defendants ask a dissolution of the injunction is because the complainants have not used due diligence in the prosecution of the suit. The bill was filed and the injunction issued on the 23d of April, 1860. The answers were filed in July following. No further step has been taken in the case by

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the complainants. The rule is well settled, that a party who relies upon the protection of the court by injunction must use due diligence in the prosecution of his suit. If he fail to sue out a subpoena or to use due diligence in expediting his cause the injunction will be dissolved. *Corey v. Voorhies*, 1 *Green's Ch. R.* 6; *West v. Smith*, 1 *Green's Ch. R.* 309; *Lee v. Cargill*, 2 *Stockt.* 331.

Upon the hearing it was suggested that the delay on the part of the complainants was in a measure attributable to some agreement or attempts at arrangement between the solicitors of the respective parties. The court then intimated that a dissolution would not be ordered upon that ground, if the complainants would proceed promptly with the cause. No further step having been taken, the injunction must be dissolved with costs.

LAVALETTE et ux. vs. THOMPSON and others.

An innocent purchaser is not liable to a latent equity of which he was ignorant.

A mortgagee is a purchaser of the mortgaged premises within the intent of the statute of frauds.

A. and B. jointly executed a mortgage to secure \$5000 upon land of which they were equally seized as tenants in common. A., by an arrangement with B., received only \$1000 of the mortgage money. B. afterwards executed a second mortgage to another party on his moiety of said lands and on another lot owned by him in severalty. Both mortgages have been duly recorded. *Held*, that as against such second mortgage, the first mortgage was a lien equally on the shares of A. and B. in the premises.

Carpenter, for complainants.

Attorney General, for defendants.

THE CHANCELLOR. The defence of usury, raised by the answer of one of the mortgagors, and to which a large

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portion of the evidence is directed, is not insisted on. The only remaining question raised by the pleadings, and discussed upon the argument, relates to the marshalling of the securities upon the mortgaged premises.

The complainants' mortgage bears date on the second of August, 1850. It was given by John R. Thompson and Charles M. Thompson and their respective wives to the complainant to secure the payment of a bond of the mortgagors, of even date, conditioned for the payment of \$6000 in three years with interest. The mortgaged premises consist of four lots, numbers 1, 2, and 3, being the joint property of both mortgagors, and number 4, being the several property of John R. Thompson alone.

On the 9th of September, 1852, John R. Thompson, in order to secure the payment of his bond for \$1000, executed to Lewis Chester a mortgage upon lot number 4, and also upon his undivided moiety of lots numbers 1, 2, and 3. This mortgage has been assigned to and is now held by John Ashcroft. Both mortgages are duly registered.

On the 29th of December, 1857, lots numbers 1, 2, and 3, which were previously held by John and Charles Thompson as tenants in common, were partitioned between them, and have since been held in severalty.

Charles M. Thompson, one of the mortgagors in the complainants' mortgage, avers in his answer, that although the bond and mortgage were jointly given by John R. Thompson and himself for the sum of \$6000, yet that, by an arrangement between the obligors, he received but \$1000, and his co-obligor \$5000 of the amount of the loan; that as to the \$5000, he is a mere security for John R. Thompson, and that he is therefore entitled to have the \$5000 paid first out of the property of John R. Thompson. As between the co-obligors and mortgagors, this claim is just and equitable; but it is resisted on the part of the holder of the second mortgage given by John R. Thompson, as prejudicial to his rights. The com-

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plainant's mortgage appears, on its face and by its registry, to be given for the joint debt of both mortgagors, and for the payment of which, in construction of law, they were equally liable. The encumbrance rested equally on the property of each. He was justified, therefore, in taking a second encumbrance on the property of John R. Thompson, relying on the information furnished by the record, that it was subject only to a mortgage of \$3000. Of the arrangement between the mortgagors themselves, neither the mortgagee nor his assignee had any actual notice. They relied, as they were justified in doing, upon the registry. 7 *Johns. Ch. R.* 16.

As between the mortgagors, the statute of frauds is inoperative. The trust is a resulting trust, and therefore valid though not in writing. But as against a bona fide purchaser, a secret trust not in writing is void.

An innocent purchaser is not liable to a latent equity of which he was ignorant. *Reilly v. Mayer*, 1 *Beasley* 55.

A mortgagee is a purchaser of the mortgaged premises within the intent and meaning of the statute of frauds. *Ledyard v. Butler*, 9 *Paige* 132.

As against the rights of subsequent mortgagees as bona fide purchasers from John R. Thompson, the equity subsisting against him in favor of his comortgagors cannot be enforced. They are entitled to have the property of the comortgagors equally appropriated for the payment of the joint debt, in accordance with the legal effect of the contract as recorded.

The fact that a separate lot of John R. Thompson was included in the mortgage in no wise affects the question at issue, nor are the rights of the encumbrancers at all altered by the partition subsequently made between the mortgagors.

Wilson v. Brown.

GARRET WILSON vs. WILLIAM BROWN and MARY ANN
BROWN, his wife.

To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment.

Where the title to land is in a married woman as her separate property, she and her husband living separate, and money is paid and advanced at her instance and for her benefit, a mortgage executed by her alone to secure such advances will be a valid and equitable lien on such property.

Strong, for complainant.

Schenck, for defendants.

THE CHANCELLOR. The complainant's bill is filed for the foreclosure of two mortgages given to the complainant. The first is executed by Brown and wife, on the 25th of March, 1857. The second is executed by Mary Ann Brown alone, on the 1st of April, 1858. As to the first mortgage, there is no dispute. The whole controversy relates to the second mortgage. A decree *pro confesso* was taken against the husband. The wife was permitted to answer alone. The material ground of defence disclosed by the answer is, that the defendant is a married woman, and that therefore the bond and mortgage executed by her are absolutely void.

The material facts of the case, as disclosed by the pleadings and evidence, are, that William Brown left his wife, and removed, from this state in 1857. On the 24th of November, 1857, a judgment was recovered against him in the Middlesex Circuit, upon which a writ of *feri facias* issued, and was levied upon two lots of the defendant in South Brunswick, *viz.* upon the lot covered by the complainant's mortgage for \$500, and upon another lot of about four acres. The first lot, being offered for sale by

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the sheriff under the execution, was struck off to Mrs. Brown for \$236, the amount due upon the execution, and the premises were conveyed to her by the sheriff. The purchase money bid for the premises was paid to the sheriff by Wilson, the complainant, and the claim of the plaintiff in execution was satisfied. On the 1st of April, 1858, Mary Ann Brown gave her individual bond and mortgage, in her husband's absence and without his consent, to the complainant for the purchase money then advanced by him. This mortgage, which is now in dispute, covers both the lots upon which the execution was levied, including not only the lot conveyed by the sheriff to Mrs. Brown but also the four acre lot, the title to which, so far as appears by the pleadings, remained in the husband.

These further facts are established by the evidence, which are disclosed neither by the bill or answer, viz. that before Brown left the state, a deed of separation was executed between him and his wife; that on the 29th of August, 1857, Brown and his wife executed a conveyance of both the lots in question to Aaron D. Messerole, who by a deed of the same date reconveyed them absolutely to the wife. At the time of the sheriff's sale, therefore, under the execution against the husband, the title to all the real estate of the husband was in the wife, subject, however, to the debts of the husband, as the conveyance to her was without consideration and void as against the husband's creditors.

Upon the case made by the bill the complainant insists—first, that having paid and satisfied the claim of the execution creditor against Brown, he is entitled to be subrogated in the place of the creditor, and to have all his remedies for the recovery of the money. There are decided objections to the validity of this claim.

1. To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying

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it must be liable, as security or otherwise, for its payment.

1 *Leading Cases in Equity* 154 *et seq.*, notes.

The complainant was not liable for the debt, nor was it paid by him upon any agreement with the debtor. In fact the debt was not paid by the complainant at all. The execution was satisfied out of Brown's property by a sale under the execution. The money, therefore, was not advanced by the complainant to pay Brown's debt, but to enable Mrs. Brown, who purchased at the sale, to pay the purchase money. The execution, moreover, is satisfied, the debt is not transferred but extinguished, and there are no rights under the judgment and execution which the complainant could acquire by subrogation.

2. The complainant relies, in the second place, upon the bond and mortgage executed by Mrs. Brown as a valid security upon her separate property.

Upon the facts disclosed by the evidence, *viz.* that the title to this land was in the wife as her separate property; that the husband and wife were living separate, and that the money paid by the complainant was advanced at the instance of the wife, and for her sole use and benefit, the encumbrance of the mortgage is a valid lien in equity upon the property of the wife.

At the time of the execution of the bond and mortgage, Mary Ann Brown, being a married woman, had no power to bind herself personally by bond or to make a valid conveyance of her real estate. As a bond and mortgage at common law, they are invalid. The bond is nevertheless in equity an acknowledgment of a debt due from her to the complainant. That debt is shown to be due on her account, and for which her separate property in equity is liable.

The mortgage, moreover, operates as an appointment of her separate property for the payment of that debt.

The complainant is therefore entitled to a decree in equity for a sale of both lots under the bond and mortgage of Mary Ann Brown.

Yates v. Yates.

It is objected, however, that neither the frame nor the prayer of the bill is adequate to this relief.

I think that an amendment of the bill is necessary. It will be permitted to be made, if desired, without cost. The facts do not appear to have been discovered by the complainant till the very close of the evidence. Had the defendant, by her answer, disclosed the whole truth, as she knew it to be, the amendment might have been made at an earlier day.

I think the amendment necessary, because upon the case, as made by the bill, at the time of the execution of the mortgage by Mary Ann Brown, the title to the four acre lot was in her husband. Her mortgage clearly could create no valid encumbrance upon the land of her husband. As to the other lot, which is covered by the \$500 mortgage of the complainant, the bill shows that the title to the equity of redemption in that lot was vested by the sheriff's deed in Mrs. Brown before she executed the mortgage to the complainant. The mortgage, moreover, was given for the purchase money of that lot, advanced by the complainant to the sheriff for the benefit of Mrs. Brown, and at her instance. The proceeds of the sale of that lot, after satisfying the mortgage of \$500, may, under the bill as now framed, be applied to the payment of the complainant's second mortgage. If, however, he intends to have recourse to the four acre lot also, the bill, as already stated, must be amended.

SARAH JANE YATES vs. HORACE YATES.

THE CHANCELLOR. The complainant seeks a divorce, but the case made by the bill and established in evidence is not within the jurisdiction of the court.

The complainant resided in this state from November,

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1850, till June, 1854, when she was abandoned by her husband. Since then she has resided in Vermont. She was not an inhabitant of this state at the time of filing her bill, nor has she been a resident of this state during the continuance of the desertion complained of.

The bill must be dismissed.

STEWART C. MARSH vs. ELIZA ANN MARSH.

A divorce cannot be had on the ground of adultery if the husband has been reconciled to his wife after the adultery committed by her, or knowingly retain her after she has committed adultery.

O. S. Halsted, for petitioner.

Runyon, for defendant.

THE CHANCELLOR. On the 6th of January, 1858, the complainant filed his petition in this court for a divorce on the ground of adultery. The adultery is alleged to have been committed in the months of March, April, May, June, and July, 1857, and especially with one J. H. G. Haines, on the 23d day of March, 1857, at the boarding house of the petitioner, in the city of Newark.

The defendant, by her answer, filed on the 15th of February, 1858, denies the charge preferred against her; and further, by way of defence, the answer states that for some time past she has been boarding at No. 3 Fair street, in the city of Newark, where the defendant has also boarded, and still boards, as the wife of the said petitioner, having occupied, and still occupying, the same apartment and bed with the said petitioner, and where this defendant and the said petitioner have and still do in all things maintain the relations and intercourse of husband and

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Two questions are made by the pleadings and involved in the evidence.

1. Is the offence charged proved to have been committed?

2. Has the offence been condoned?

Before considering the evidence upon the question of the guilt or innocence of the defendant of the offence charged, it will be proper to consider the second question, viz. whether the offence, if committed, has been condoned; for if there has been a condonation of the alleged offence the complainant is not in a position to enforce his remedy; and so far as the result of this suit is concerned, it is a matter of indifference whether the defendant be guilty or innocent of the crime charged.

It is a familiar principle, that a divorce cannot be had on account of adultery if the husband has been reconciled to his wife after the adultery committed by her, or knowingly retain her after she has committed adultery.

Condonation may be implied if the husband, after reasonable knowledge of the infidelity of his wife, continues to admit her as the partner of his bed. *Poynter on Mar. and Divorce* 232.

In support of this principle, the author cites from *Oughton's Ordo Judiciorum*, tit. 214, the following passage. Though the party be proved guilty as alleged, yet if the complainant, before suit instituted, had notice, at least probable, of the crime committed and charged, and notwithstanding afterwards had carnal knowledge with the guilty party, the complainant shall have no decree of divorce, because by this it is said the complainant has forgiven and condoned the injury.

Reasonable knowledge may be said to have been had when information of a fact is given by credible persons, speaking of their own knowledge particularly, if the same facts be afterwards proved and they become instrumental in the proof. *Poynter on Mar. and Div.* 232; *Dobbyn v. Dobbyn*, *Ibid* 233, note z.

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If the party accused of adultery shall prove that the accuser, before the commencement of the suit, had probable knowledge of the crime committed, and yet afterwards cohabited with the accused, in such case the accuser shall not obtain a sentence of divorce for the crime that shall be supposed to have been remitted. *Shelford v. Mar. and Div.* 445; *Bishop on Mar. and Div.* § 359.

I have always understood (says Doct. Lushington, in delivering judgment in *Dillon v. Dillon*,) the legal principle to be this, that when a husband has received information respecting his wife's guilt, and can place such reliance on the truth of it as to act on it, although he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her. 3 *Curteis* 86.

The adultery is charged in the complainant's petition to have taken place from March to July, 1857, and the act more especially relied on is charged to have occurred on the 23d of March, 1857. That occurrence is proved to have taken place upon that day. If the witness speak truly, it affords the most material evidence of the defendant's guilt. Yet the only witness by whom that occurrence is proved to have taken place testifies that she told the complainant all that she saw soon after it occurred. She is sure that she told him before July 4th, 1857. Other circumstances, which occurred about the same time, and which are relied upon as corroborative evidence of the defendant's guilt, occurred at the boarding house where the parties and many others lived. They were not concealed, but many of them, in the language of one of the witnesses of the complainant, known to all the house.

It appears, then, as early as July 4th, 1857, the petitioner had not only probable knowledge, but if his witness is truthful, certain information of his wife's guilt. He had the very information from the lips of the same witness upon which he asks this court to pronounce his wife

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guilty. He, at least, must be presumed to have deemed the witness credible, (for he has placed her on the stand) to sustain his case.

It is the very case stated in the books already cited as showing reasonable knowledge, *viz.* information of the fact given by a credible person speaking of her own knowledge, and the same fact afterwards proved and the informer becoming instrumental in the proof. It was natural to suppose, as was said by Doct. Jenner, in *Dobbyn v. Dobbyn*, that after the information he had received, if he entertained any doubt of his wife's guilt, he would have addressed himself to the persons who resided in the same house with his wife, or to those who visited her. All the facts appear to have been fully within his reach.

And yet the petition for his divorce was not filed until the 8th of January, 1858, six months after he received the information. During all this time he continued to cohabit with his wife as if nothing had occurred; and not only so, but what seems the most remarkable feature of the case, the evidence shows conclusively that the cohabitation continued up to the month of March, 1857, two months at least after the filing of the petition. The defendant, by her answer, filed on the 15th February, 1857, states that she and her husband were then occupying the same bed and cohabiting as man and wife. No less than four witnesses state the fact, that the parties continued together at their boarding-house until the month of March, 1857. They occupied two rooms on the second floor. The petitioner occupied the front room as his office. The back room was his bed-room. It contained but one bed, and was occupied by both husband and wife. The proprietor of the house and his wife both state these facts, though they did not see the parties go to bed they both suppose that Mrs. Marsh slept in the bed in her husband's bed-room. Another witness, who lived in the house, says, as long as they were there together they occupied

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the same sleeping room; I never knew any difference; I suppose they did; there was no more than one bed in it. Another witness, a female domestic in the family, says, I was with Mrs. Thompson for five months; was there when Mrs. Marsh left. Up to the time of Mrs. Marsh's leaving, Doctor and Mrs. Marsh occupied the same bed-chamber and the same bed.

The general presumption is that husband and wife living in the same house live on terms of matrimonial cohabitation. *Beeby v. Beeby*, 1 *Haggard's Ec. R.* 789; *Shelford on Mar. and Div.* 488.

It is enough, as against the husband, to raise a presumption of condonation that he had been once in bed with his wife after knowledge of her adultery. *Bishop on Mar. and Div.* § 364.

But here a continued matrimonial intercourse is shown, extending through weeks and months, after reasonable knowledge of the guilt of the wife is brought home to the petitioner.

This very decisive testimony is attempted to be overthrown by the parol evidence of a single witness as to a declaration made by Mrs. Marsh. The witness says, "she complained to me of being neglected by Doct. Marsh, and that others received his attentions, and that she knew no more about Doct. Marsh for the last six months as a husband than she did about me." The witness was examined on the 3d of September, 1860. On his cross-examination, he states that this conversation took place on the 12th of October, 1858, at the house of the defendant in Broad street. It is shown very clearly, by the defendant's evidence, that she did not move into Broad street until 1859. Whether uttered in October, 1858 or 1859, assuming the witness to have been perfectly reliable and accurate in his recollection, it is not perceived that the statement necessarily impugns in the least the fact of connubial intercourse shown to have continued between the parties for a long period.

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It has not escaped the attention of the court that there is evidence of a transaction strongly tending (if believed) to show the guilt of the defendant, which occurred in February, 1857. But there is a twofold difficulty in making this circumstance the ground of a decree; for not only is connubial intercourse shown to have continued between the parties after it occurred, but it is proven to have taken place in the month of February, 1857, after the complainant's petition was filed.

It is difficult to conceive of a clearer case of condonation than is established by the evidence in this case. The legal presumption from the facts proved is, that the offence was forgiven. Upon well settled rules, the petition cannot be entertained.

This renders it unnecessary to examine the remaining issue in the cause, viz. the question of the defendant's guilt or innocence.

The petition must be dismissed.

FRANCIS D. A. CONGER vs. ELLEN CONGER.

A wife having left her home with the consent of her husband with the intent of spending the holidays with her mother, her subsequent change of purpose and refusal to return will not convert such absence into a wilful desertion from the time of leaving her home within the act relating to divorces.

THE CHANCELLOR. The case made by the complainant's bill is sustained neither by the evidence nor by the report of the master. The bill seeks a divorce on the ground of a wilful, continued, and obstinate desertion of the complainant by his wife for the term of three years. The bill was filed on the 8th of December, 1860, and claims that the desertion took place three years prior to that time. The master reports that the defendant deserted her hus-

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and before the 8th day of December, 1860, and that she absented herself from him for the space of three years. That, if true, is wholly immaterial, for the report is dated on the 7th of March, 1861. The master does not report that the defendant deserted her husband before the 8th day of December, 1860, and three years before the filing of the complainant's bill, which was the material point of inquiry. He could not have intended so to do, for the evidence warrants no such conclusion.

The bill charges that the wife continued with her husband till *about* thanksgiving day, 1857, when she left him professedly on a visit to her friends in Buffalo; that about *two weeks* after she so left the complainant went to Buffalo, and found her at her mother's house, and that she then declined to return with her husband to Newark, on the ground that she wished him first to leave his father's, and procure a house to live in.

The complainant's father swears that the parties were married in the fall, *about three months before* she went away. The evidence shows that the marriage took place on the *14th of September*, 1857. This would fix the time of the defendant leaving home at or about the 20th of December; and that this was about the time of her departure is rendered highly probable from the fact that both the witnesses testify that she left Newark upon an invitation from her mother to come home to Buffalo and spend *the holidays*. The bill charges that the husband went out for her about two weeks after she left him. If she left on the 8th of December, and the husband went for her in two weeks, he must have gone for her before the holidays, which under the circumstances he would not have done, and which the evidence shows he did not. On the contrary, the evidence shows that it was probably as late as the middle of February when the complainant went for his wife. The circumstance testified to by the witness, that the wife left her husband a few days after thanksgiving is of no weight whatever. It is not

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shown when thanksgiving day in 1857 occurred, and if it was, what is meant by a few days after—a week? a fortnight? or a month?

But if it had been clearly shown that she left Newark more than three years before the filing of the bill, a case of desertion for three years is not established. There is no evidence that she left Newark with any intention of deserting her husband. She left Newark, and went to Buffalo upon the invitation of her mother to spend the holidays at home. Upon this point the evidence is clear and uncontradicted. When her husband went for her she was found at her mother's house. The husband testifies that when she left home it was with the intention of going on a visit. He expected she would come back of course. He prepared for her return by taking a house, furnishing it, and getting in his coal. He had, it would seem, no intimation of her intention not to return until his visit to Buffalo in February or until the receipt of her letter of the 1st of March. If she left home with the consent of her husband, with the *bona fide* purpose of spending the holidays with her mother, her subsequent change of purpose cannot convert such absence into a wilful desertion of her husband and a criminal violation of her marital duties.

There is a total failure of evidence to support the complainant's bill. Upon such evidence it is not surprising that the master failed to report in favor of the complainant. The only matter of regret is that he did not report in accordance with the evidence, unequivocally and directly against the prayer of the bill.

The bill must be dismissed.



Wilson v. Marsh.

WILSON vs. MARSH.

A decree will bear only six per cent. interest, although founded on a mortgage drawing seven per cent.
Decrees in equity, as well as judgments at law, universally bear the legal rate of interest, without regard to the terms of the contract or to the place where it was executed, whether within the state or abroad.

THE CHANCELLOR. The complainant's mortgage was made in Essex county, and bears interest at the rate of seven per cent. per annum, under a special contract for that purpose, made by authority of the statute. He now asks that interest be allowed at the same rate upon the decree. The decree bears only legal interest, viz. six per cent. A higher rate of interest is permitted by the statute to be taken in certain counties, by special contract for that purpose. The contract is merged in the decree, and the decree is controlled not by the contract but by the statute, which allows interest at the rate of six per cent.

It was so held by the Supreme Court of this state under the act of 1823, which changed the legal rate of interest from seven to six per cent. *Verree v. Hughes*, 6 Halst. 91.

A similar practice was adopted in this court. Interest under the decree from the date of the master's report was reckoned at six per cent. only.

The point has been repeatedly decided both in equity and at law. *Aldrich v. Sharp*, 3 Scammon 261; *Wernwag v. Brown*, 3 Blackf. 457; *Mason v. Cake*, Breese 52.

In the case last cited the judgment was upon a contract to pay money with interest at twenty per cent., a rate authorized by statute. An execution issued upon the judgment for interest at twenty per cent. was quashed.

Decrees in equity, as well as judgments at law, in this state, universally bear the legal rate of interest, without regard to the terms of the contract or to the place where it was executed, whether within the state or abroad.

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See further, 2 *Fonb. Eq.* 424, note a; 5 *Gray's R.* 9, *Barringer v. King*; 2 *Mad. Ch. Pr.* 455; 6 *Johns. R.* 283, *Watson v. Fuller*; 2 *Chitty's Dig.* "Interest," as to *Practice in Eng. Eq.*

THE INDUSTRIAL SCHOOL DISTRICT vs. WHITEHEAD.

Every statute is by implication a repeal of all prior statutes, so far as it is repugnant thereto.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet if it was clearly intended to prescribe the only rule that should govern in the case provided for it repeals the original act.

But unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force.

There is nothing in the act to establish the city of Elizabeth which expressly or by necessary implication supersedes the trustees of the incorporated school district or abrogates their rights of property.

Alward, for complainants.

R. S. Green, for defendant.

THE CHANCELLOR. To the complainant's bill the defendant pleads, that by the act to establish the city of Elizabeth, approved March 13th, 1855, the legislature superseded "the Industrial School District," and vested all their rights, franchises, immunities, powers, and privileges in the city of Elizabeth and in the board of commissioners of schools of said city.

The complainants are the trustees of a school district, duly incorporated under the laws of this state, within the township of Elizabeth. The defendant was the superintendent of public schools in said township from April, 1853, to April, 1855, and during that period received large sums of money, to which the complainants are entitled, and for which they now ask an account and settle-

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The facts averred in the bill are admitted by the defendant, and for the purpose of this issue must be assumed to be true.

The simple issue raised by the plea is, whether the provisions of the statute in regard to the trustees of public schools within the township of Elizabeth are repealed, and the rights acquired under them abrogated by the city charter.

It is admitted that there is no express repeal of any of the provisions of the school law. The repeal, if it exists, must be by necessary implication. The ground taken by the defendant is, that the corporation is made useless or inefficient by the terms of the city charter, and all its rights, franchises, immunities, powers, and privileges transferred to the city and to the school commissioners.

Every statute is by implication a repeal of all prior statutes, so far as it is repugnant thereto. And if the subsequent statute be not repugnant in all its provisions to the prior one, yet if it was clearly intended to prescribe a new rule that should govern in the case provided for, it repeals the original act. *Sedgwick on Statute Law* 124-5; *West v. Pine*, 4 Wash. C. C. R. 691.

But the repeal of a statute by implication is not favored. If the latter statute is manifestly inconsistent with the former, both remain in force. Courts are bound to uphold the prior law if the two may stand together. The matter must be so clearly repugnant that it necessarily implies a negative. *Dwarris on Statutes* 674; 1 Bl. Com. 89, and cases cited, note 34, (*Sharswood* ed.); *Beals v. Hale*, 4 Howard U. S. 37; *Bowen v. Hill*, 5 Hill 221, and cases cited, note a, 225.

Applying these principles to the facts of the case, are the provisions of the school law, under which the complainants claim their rights and franchises, repealed by the charter? By the "act to establish public schools," Dig. 775, § 7, 9, the trustees of the several school districts are authorized to determine how many months

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in a year the school shall be kept, to designate a site for the school house, to provide a suitable house or room where a school shall be taught, to contract with and employ a teacher, and to perform other duties touching the interest and welfare of the school and the means of carrying the system into effect.

By the supplement, approved March 14th, 1851, *Nix. Dig.* 738, § 9 and 10, a mode is pointed out by which the trustees of any school district may, at their own desire, become incorporated, and be a body politic and corporate, capable of suing and being sued, of making and using a common seal, of taking and holding such real estate as may be necessary for school houses, and of disposing thereof, and of taking, holding, and disposing of any other estate, real and personal, that may be devised, bequeathed, or given to them for the use of public schools in said district; and by the eleventh section of the act, the inhabitants of any incorporated school district are empowered to authorize the trustees to purchase land, to build, enlarge, repair, sell, or mortgage a school house or houses, to appropriate the money apportioned to the district, or any part thereof, for that purpose, or to borrow money therefor, and to raise by taxation for said purposes, any such sum of money as two-thirds of the inhabitants, duly assembled for that purpose, shall agree to. The money so raised by taxation is directed to be paid to the superintendent of the township in which the district is situated, for the use of the said district, to be paid out on the order of the trustees thereof.

So far as relates to the duties of the trustees of school districts under the original act of 1846, they seem, with perhaps one exception, to have been imposed by the city charter upon the school commissioners or the authorities of the city. So far, at least, the powers and duties of the trustees of the school districts are superseded and the provisions of the prior act repealed.

But there is nothing in the city charter which can be

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construed to abrogate or impair the rights acquired by the inhabitants of *incorporated* school districts under the supplement of 1851. By authority of that act, the trustees, as a corporation, may have incurred heavy debts. No provision is made by the city charter for the payment of those debts. They may have acquired, in addition to the amount raised by taxation, valuable estate, real and personal, by gift, devise, or bequest. The right to all this property is vested in the corporation. The city charter does not interfere with that right of property. It was manifestly the design of the legislature to encourage the promotion of learning, and to induce liberal appropriations in support of common schools, by assuring to the inhabitants of each school district the exclusive use and enjoyment, for the purposes of education, of all money thus appropriated by them or acquired by gift, devise, or bequest. True it is to be used solely for the purposes of education, but that does not affect their right of property. Though dedicated to a public purpose, as against the city, it belongs in equity to the inhabitants of the school district as much as the city property belongs to it, as against the rest of the county.

There is nothing in the city charter which expressly or by implication supersedes the trustees of the incorporated school district or abrogates their rights of property.

The plea must be overruled with costs.

JOHN A. POST and others vs. ABRAHAM STEVENS, jun.,
and CORNELIUS BERGEN, executor of Abraham Stevens,
deceased.

Where the necessity for filing the bill was occasioned by the misconduct of the defendants as executors, in omitting to inventory and in refusing to account for moneys which were due the estate, no costs will be allowed them out of the estate.

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Woodruff, for complainants.

Gledhill, for defendants.

THE CHANCELLOR. The bill was filed by the residuary legatees under the will of Abraham Stevens, deceased, for a settlement of the estate, and the recovery of the shares of the estate to which the complainants are respectively entitled. The bill charges, that Abraham Stevens, jun., one of the executors, was indebted to the testator, at the time of his death, in about the sum of \$2000, and that there were large amounts due from other individuals, none of which were included in the inventory of the estate. The bill charges fraud as against Stevens, one of the executors, and a breach of duty on the part of the other executor, in knowingly permitting omissions to be made in making out the inventory. The principal controversy in the cause related to the debt due from one of the executors to his father, the testator. By the decree of the Chancellor, made at October term, 1857, this claim was established, and Stevens was required to account for the amount of two notes, given by him to his father in his lifetime, which were not included in the inventory, and which now amount, as appears by the master's report, with interest, to \$1923.21. The other charges against the executor were held not to be sustained by the evidence. From this decree an appeal was taken by the executors, and the Chancellor's decision affirmed with costs.

The master having taken and stated the account of the executors, and no exception having been taken thereto, the question of costs and commissions is now submitted for adjustment by the court.

On examining the master's report, the question of costs appears to have been decided by the master adversely to the executors. But as the schedule referred to by him, containing a statement of the costs, is not annexed to the report, and as the question was treated as an open one by

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both counsel, I shall consider the matter as though it had **not** been decided by the master.

So far as relates to the costs on appeal, the question has been already settled. The decree of the Chancellor was affirmed, with costs, against the executors, in favor of the complainants. The complainants are the residuary legatees under the will, and entitled to the net balance of the estate. To allow the executors those costs out of the estate would virtually, in this respect, be a reversal of that decree. The claim for costs in this court must also be disallowed. The costs have mainly arisen from an attempt on the part of one of the executors to establish his claim to be relieved from the payment of certain debts due from him to the testator. The decree of the court is against them. The utmost they can in equity ask is, that they should not be charged with the costs of the adverse party. There is no equity in requiring the adverse party to pay their costs incurred in a wrongful defence. It is true there has been a settlement of the estate, and that a part of the claim set up by the complainants was not established. Yet the necessity of filing the bill, and bringing the cause into this court at all, was occasioned by the misconduct of the defendants in omitting to inventory and in refusing to account for a large amount of money which was due the estate. No costs are allowed.

Commissions will be allowed to the executors for their services at the *maximum* rate allowed by the act of March 17th, 1855.

ADMINISTRATOR OF JONATHAN MOORE *vs.* WALLACE VAIL
and others.

A mortgagor conveying the premises procured and delivered to the vendee a receipt from the mortgagee showing that the interest on the mortgage was paid to time of sale. The vendee afterwards sold the premises,

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stating that the interest was paid as above, but subsequently redelivered the receipt to his vendor, who gave it up to the mortgagee. *Held*, that the interest could not be recovered against the second vendee on a foreclosure of the mortgage.

I. V. Voorhees, for complainant.

Beasley, for defendants.

THE CHANCELLOR. The validity of the mortgage which the complainant seeks to foreclose is not disputed. The only question raised by the evidence is, whether the complainant is entitled to recover four years' interest from the date of the mortgage, on the 12th of April, 1853, to the 12th of April, 1857. The interest, it is conceded, has not been paid. The defendant relies on the following facts to sustain his defence to that part of the claim.

In June, 1857, Augustus Moore, the mortgagor, conveyed the premises subject to the mortgage to George Angleman, the purchaser, by the terms of the deed engaging to pay the mortgage, with interest from the date of the conveyance, that being deemed and computed as a part of the purchase money. With the deed, the vendor delivered to the purchaser a receipt from the mortgagee for four years' interest on the mortgage up to the 12th of April, 1857.

While this receipt remained in Angleman's possession, on the 23d of September, 1857, he conveyed the premises to Wallace Vail, the purchaser by the terms of the deed, engaging to pay the mortgage with interest from the date of the conveyance. At the time of the conveyance Angleman held the receipt of the mortgagee for the interest in question. By the terms of the contract, the interest was to be discharged up to the 12th of April, 1857, and Angleman represented to Vail that the interest had been paid, though he did not exhibit the receipt of the mortgagee.

After the conveyance to Vail, the mortgagor, Augustus Moore, obtained the receipt of the mortgagee from

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Angleman, upon some arrangement between themselves, and returned it to the mortgagee, by whom it was cancelled. Augustus Moore, the mortgagor, now alleges that he obtained the receipt from the mortgagee, his father, without paying the interest, upon an agreement that Angleman would, out of the proceeds of the sale to Vail, pay him sufficient to satisfy the interest; that the receipt was necessary to clear the title, and as soon as the money was received he would pay the interest; that Angleman failed to perform his agreement, and that he, the mortgagor, never did pay the interest to his father.

It is clear that the surrender of the receipt by Angleman, after he had parted with the title, could in no wise affect the rights of his vendee. His rights were settled at the time of the transfer of title, and no subsequent act or declaration of the vendor could impair those rights.

At the time of the sale and conveyance to Vail, Angleman held the mortgagee's receipt for the interest now in dispute. If he had exhibited that receipt to the purchaser, and upon that evidence of payment Vail had taken title, it is admitted that the mortgagee could not recover, because he had enabled the vendor to practise a fraud upon the vendee.

It is urged that, as the vendee did not see the receipt, it in no wise contributed to the fraud; that the purchaser relied alone upon the representation of the vendor, and that the receipt was not used as an instrument of fraud.

But if the receipt was not seen by the purchaser, it nevertheless was held by the vendor, and was delivered to him for the express purpose of enabling him to sell clear of the charge of the interest, the payment of which was admitted by the receipt. It enabled the vendor to represent that the interest was satisfied, and not only justified him in making the representation but enabled him to sustain his assertion by the production of the receipt, if its production had been demanded.

Thus far it has been assumed that the statement of

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Augustus Moore is true, and that Angleman, when he took his title and came into the possession of the receipt knew that the interest had not been paid. This clearly would render the receipt in Angleman's hands nugatory and place the defence exclusively on the ground that the mortgagee, by giving the receipt, had enabled Angleman to perpetrate a fraud upon his vendee. But this is by no means the strongest view of the defence. Angleman testifies that he had no knowledge that the interest had not been paid by the mortgagor until after he had conveyed the premises to Vail, and the evidence warrants the belief that this statement is in accordance with the truth. The receipt for this interest was delivered to Angleman with his title, in accordance with the contract of the mortgagor, that he would discharge this interest. It is hardly probable that when delivering to his vendee a receipt as evidence that he had complied with his contract and paid the interest, he at the same time informed him that the interest had not been paid. It is evident, moreover, that the mortgagor recognised the receipt as a valid subsisting instrument in the hands of Angleman, and that he paid a valuable consideration to get it out of his hands after the title had been made to Vail. Adopting this as the true theory of the case, justified by the weight of the evidence, there is no room for question that Vail holds these premises clear of the charge of the interest in controversy. It was no encumbrance on the lands while the title remained in Angleman, and from Angleman the title passed in the same condition to Vail.

In either aspect of the case, Vail is entitled to a credit upon the mortgage for the four years' interest specified in the receipt. If the mortgagee suffers loss, his estate must look to the mortgagor for indemnity.

No costs will be allowed as against either party in favour of the other; not against the defendant, for he has been successful in his defence upon the matter in controversy, and because no more has been recovered against him than

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he offered, and was willing to pay before the commencement of the suit; not against the complainant, because no legal tender or appropriation was made, and he was compelled to resort to equity to establish his right and recover the amount due upon the mortgage. At the time of the tender, and as a condition of the payment of the money, the defendant demanded a surrender of the bond and mortgage. This clearly rendered the tender ineffectual, either to stop the accruing of interest or to entitle the defendant to costs. *Gammon v. Stone*, 1 *Vesey*, sen. 839; *Beames' Equity Costs*, 45, and cases cited in note *q*. See also *Hovenden's note to Lord Cranstown v. Johnston*, 3 *Vesey* 170.

The amount tendered merely satisfied the claim of the mortgagee against the mortgaged premises in the hands of the purchaser. It did not extinguish his claim against the mortgagor. The interest in dispute has never been received by the mortgagee. The mortgagor, as it appears by his own evidence, obtained the receipt for the interest upon a promise to pay it, which he never performed. The mortgagee, therefore, was entitled to retain the bond for the purpose of enforcing his claim against the mortgagor.

Decree accordingly.

ASA MCPHERSON vs. GEORGE HOUSEL.

A person purchasing *pendente lite* is subject to all the equities of the person under whom he claims.

In a foreclosure suit, the costs incurred by the complainant in resisting a motion on the part of the mortgagor to set aside the execution will be ordered paid out of the surplus money in preference to the claim of a purchaser of the mortgaged premises, who takes title from the mortgagor after the decree and before the motion to set aside execution.

McPherson v. Housel.

Van Syckel, for motion.*Allen*, contra.

THE CHANCELLOR. On the 12th of July, 1860, a final decree was made in this cause for the foreclosure and sale of mortgaged premises, and execution issued thereon.

On the 25th of July, 1860, subsequent to the decree and issue of execution, Housel conveyed the mortgaged premises in fee to Asa Snyder.

Subsequent to the date of this deed, on the 30th of August, 1860, Housel, the defendant in execution, obtained a rule to show cause why the execution should not be set aside, the decree opened, and the defendant admitted to defend the suit. On the 18th of October, the rule to show cause was discharged with costs, and the sheriff ordered to proceed to a sale of the mortgaged premises according to the command of the execution. On the 20th of October, the deed to Snyder was recorded.

The mortgaged premises having been sold, and the surplus money brought into court, Snyder, the owner of the mortgaged premises, asks that the surplus money be paid to him. The complainant in the suit has also filed his petition, asking that out of the surplus moneys arising from the sale he should be paid and satisfied his taxed costs incurred in obtaining the discharge of the rule to show cause why the decree should not be opened.

The material facts are agreed upon by the counsel of the respective petitioners.

The only question is, whether the complainant in the foreclosure suit is entitled to have the costs incurred by him in setting aside the rule to show cause paid out of the proceeds of the sale of the mortgaged premises. These costs are clearly a part of the cost of the foreclosure suit, necessarily incurred by the mortgagee in enforcing his remedy against the mortgaged premises. Had the rule to show cause been obtained before the execu-

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on issued, the costs of discharging it would have been included in the execution as a part of the sum to be paid. The complainant's equitable right to the costs is not altered by the fact, that the rule to show cause was obtained after execution issued. As between the complainant and the defendant in the suit, the complainant's right to be paid his costs out of the proceeds of the sale is clear.

But it is insisted, on behalf of the alienee of the mortgagor, that having purchased the premises after final decree, and *fiery facias* issued thereon, he took the premises subject only to the encumbrance of the decree and execution; and that to impose upon the estate conveyed the costs subsequently created would encumber the estate conveyed with the costs of the litigation of the grantor, after he had parted with the title.

But the rule is well settled, that a person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the person under whom he claims, and he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title; and the litigating parties are exempted from taking any notice of the title acquired. *Story's Eq. Pl.* § 156; 1 *Story's Eq. Jur.* § 406. It seems to follow, as a necessary consequence, that the alienee of mortgaged premises, during the pendency of the suit for foreclosure and sale, takes title subject to the burden of all the costs which may be incurred by the mortgagee until the final determination of the cause.

The fallacy of the opposite argument consists in assuming that the decree is the termination of the suit, and that it determines all the costs for which the alienee can be legitimately liable. But the mortgagor is entitled to contest the validity of the decree, either by applying to this court to set it aside or by appeal to a higher tribunal; and in either event the costs of this further litigation form a legitimate part of the costs of the suit, which the mortgagor

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gagee is entitled to have satisfied out of the proceeds of the sale of the mortgaged premises. The purchaser, during the pendency of the suit, took subject to all the rights of the parties litigant, and subject also to all burthens created in the exercise of those rights. If the mortgagor, by the sale, parted with all his interest in the equity of redemption, and had no legal or equitable right further to controvert the claims of the mortgagee, it would have been competent for his alienee to protect his interests by applying to the court to prevent further litigation. But so far as appears, the litigation in this case subsequent to the conveyance by the mortgagor may have been at the instance of the alienee, as it would obviously have enured to his benefit had it proved successful. But, however this may be, there is no pretence that the complainant in the suit had any notice of the alienation, or that any objection was interposed to the continuance of the litigation upon that ground; on the contrary the transfer of the title was secret, the conveyance not being put upon record until after the final order in the cause.

The complainant is entitled to his costs, pursuant to the prayer of his petition, and also the costs of the present application, out of the surplus money arising from the sale. The balance, if any, is due to the purchaser of the equity of redemption.

ISAAC VAN KUREN vs. THE TRENTON LOCOMOTIVE AND
MACHINE MANUFACTURING COMPANY and others.

A nice or doubtful question of law will not be decided on a motion to dissolve an injunction, but will be reserved for the final hearing.

An injunction restraining interference with the complainant in the exercise of his rights as a partner of the defendants will be dissolved on the clear averment in the answer, that the partnership was dissolved by mutual consent.

Can a corporation enter into a copartnership? *Query.*

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Dutcher, for complainant.

Beasley, for defendants.

THE CHANCELLOR. The defendants ask a dissolution of the injunction on the ground that the equity of the bill is denied by the answer.

The material charges of the complainant's bill are, that on the 20th of January, 1860, an agreement was entered into between the complainant and the company, by virtue of which the complainant and the company agreed to carry on the foundry business upon the following terms.

The company agreed to furnish their foundry, with all its fixtures, machinery, facilities, power, wharf room, cranes, and pattern room, for the purpose of manufacturing iron castings, for the sum of \$4000 per annum, to be paid out of the undivided proceeds of the business; additional tools to be at the joint account of the foundry.

The company were to furnish the necessary capital to carry on the business, to use the car wheels of complainant's patent, and to take from the foundry all other iron castings used in their business at the regular market prices.

The complainant, on his part, agreed to give the company the exclusive right to manufacture and sell his patent railroad car wheel and Hurlbert's patent plows, to defend the patents in all cases, and to give his personal and faithful attention to the foundry concerns.

The net profits of the business to be equally divided between the parties.

The agreement, unless sooner annulled by mutual consent, to be binding for twelve years.

On the 31st days of June and December, in each year, an account of stock to be taken, an account current to be made up, and the net profits to be equally divided between the parties. At the close of the contract, an account of the stock and joint liabilities was to be taken by the parties, and an equal division of profits made. The

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agreement contains other provisions, but these are all that are pertinent to the present inquiry.

The bill further charges, that this agreement constituted the complainant a partner with the defendants, and liable for the debts of the concern; that the agreement is still in force; that the complainant, in pursuance of the contract, took charge of the foundry on the 15th of March, 1860, and transacted the business in the name of L. Van Kuren and Company; that the net profits of the business, up to the 1st of January, 1861, are \$4916.48, one half of which is justly due to the complainant from the machine company for his share of the profits of the castings; that there is due to the employees and workmen in the foundry about \$1500, payable out of the proceeds of the foundry business, which sum has been charged in account by the machine company to Van Kuren & Co., but has never been paid; and that the complainant, the agreement remaining in full force, has been forcibly excluded from the management of the foundry and of his interest as a partner in the business; that the partnership property is taken by the machine company without the payment of the debts of the concern or of the complainant's share of the property; and that the company are insolvent and unable to pay their just debts, and if permitted to take possession of the foundry property, the complainant will be unable to recover either the amount due to him or the means necessary to pay the debts of the concern.

The material averments of the bill which constitute the complainant's equity, and upon which his right to a continuance of the injunction rests, are—

1. That the complainant was and is a partner of the defendants, and that he is entitled to the aid of the court to protect him in the exercise and enjoyment of his rights as partner.

2. That if the partnership or agreement is determined, he is entitled to the sum of \$2458.21, as his share of the

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profits of the concern, and to be protected against liabilities for its debts, and that the defendants should therefore be restrained from diverting the property of the foundry to the purposes of the machine company, until account can be taken and the foundry debts satisfied. It is objected—first, that a corporation has no power to form a partnership with an individual to carry on the business, or a part of the business, for the transaction of which the company were incorporated. I do not think that this objection, even if it be well founded, should avail the defendants upon the present motion. A nice or doubtful question of law should be reserved for final ruling. It is clear that these defendants have, under and by force of this contract, had the services of the complainant and the use of his patents for the greater part of a year, and they admit that he has received no remuneration whatever. Under such circumstances, a court of equity would not suffer the defendants, except in a perfectly clear case, to withdraw the property from the protection of the court upon the allegation that they had no power to make the contract.

For the purposes of this motion, it will be assumed, therefore, that the corporation had the legal power to create the partnership.

Does the agreement in fact create a partnership? The answer of one of the defendants, as a matter of opinion and belief, denies that the agreement does constitute a partnership. It is a mere inference or conclusion of law, and not a matter of fact, and therefore not properly a denial of the equity of the bill.

It seems too clear to admit of dispute that the instrument, in its legal effect, does create a partnership, and under the complainant liable for the debts of the concern, and that not only as to third parties, but as between the parties themselves. The joint concern pay the machine company \$4000 per annum for the rent of the foundry and its appurtenances. The machine company

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furnish the capital. The complainant contributes his services and the use of his patents; at the close of the concern an account is to be taken by the parties of the joint stock and joint liabilities, and an equal division of profits to be made. Can the legal and essential ingredients of a partnership be more clearly stated? It is urged that the parties did not intend to create a partnership, because the term partners or partnership is nowhere used in the instrument. It may be urged, with equal truth, that the term foreman or superintendent, or any other term which might indicate the precise character of the complainant's employment is carefully avoided, so that the intent of the parties must be ascertained from the legal effect of the instrument, and not the names employed by the parties. In legal effect the instrument constituted a partnership.

Does that partnership continue? Upon this point the answer of both defendants is full, direct, and unequivocal. They both say that it was agreed by the complainant and the defendants, acting for the company, that the business connection created by the agreement should cease and determine on the 31st day of December last, and that an account of stock should be taken, and a settlement made up to that time, in accordance with the provision of the article of agreement. This is not new matter. The complainant, in his bill, directly charges that the contract between him and the company is still in full force and effect, never having been closed or annulled by the parties thereto. The answer upon this point is directly responsive to the charge of the bill. The agreement, whether it constituted a partnership or not, was, by its terms, to continue for twelve years, unless sooner annulled by mutual consent; and the defendants clearly could not determine the contract of their own motion, and forcibly exclude the defendant from the possession and enjoyment of his rights. Against this wrong the injunction was designed to protect him. Upon this point the equity of the bill is fully denied by the answer.

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The answer also denies that there is any money whatever due to the complainant from the foundry concern, his share of the net profits; but, on the contrary, they aver that the business, during the whole time of its management by the complainant, occasioned a constant loss.

The only remaining ground of equity in the bill is, that the complainant, by reason of the contract, is liable for debts due on the foundry account to the workmen. The bill does not allege the existence of any other debts than those due to the workmen. The answer admits that there are due to the workmen the sum of \$842.08, but alleges that it is a debt of the machine company alone, in whose name all the contracts were made, and by whom workmen were furnished to carry on the operations of the foundry. But admitting the case made by the bill upon this point to be uncontradicted, assuming that there is due to the workmen the sum of \$1500, as charged by the complainant, and that, by reason of the partnership, he is or may be liable for the amount, it constitutes no ground for sustaining the injunction and continuing the complainant in the possession and control of the property. The utmost that he could ask for his protection would be the appointment of a receiver.

The court may doubtless, in the exercise of a sound discretion, continue the injunction to the hearing notwithstanding the equity of the bill is denied by the answer. But this is clearly not a case for the exercise of such discretion. On the contrary, it is obvious that the continuing of the injunction and keeping the complainant in the possession and management of the foundry, as the case now stands before the court, would lead to serious embarrassment to the business of the defendants without any corresponding benefit to the complainant.

The injunction must be dissolved with costs.

Laroe v. Douglass.

JACOB S. LAROE and others vs. MARCUS B. DOUGLASS, surviving executor of Samuel Laroe.

The law is well settled in this state, that when executors jointly settle their final account they are jointly liable for the balance so ascertained.

In such case the parties interested may rely on the settlement, and are not driven to a discovery in whose hands the funds are or in what proportion the executors are liable.

If a trustee, by his own negligence, suffers his cotrustee to receive and waste the trust fund, when he had the means of preventing such receipt and waste by the exercise of reasonable care and diligence, he will in such case be held personally responsible for the loss.

Keasby, for complainants.

Bradley, for defendant.

THE CHANCELLOR. This bill is filed by two of the children and legatees of Samuel Laroe, deceased, against his surviving executor, for an account of the estate and the recovery of legacies bequeathed by the will of the testator.

The evidence in the cause satisfactorily establishes the following facts. Samuel Laroe, the testator, died on the 2d of May, 1828. By his last will, after making bequests to his younger children, he directs his real and personal estate to be sold on the death or marriage of his widow, and to be divided equally among all his children. Marcus B. Douglass and James S. Laroe, the eldest son of the testator, were appointed executors. The widow died on the 5th of March, 1831. The executors, having made sale of the real and personal estate, exhibited their joint account for settlement to the Orphans Court of the county of Morris at March term, 1836. By the decree of settlement there was ascertained to be a balance in the hands of the executors sufficient, after satisfying all the specific legacies, to leave a fund for distribution among all the

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children pursuant to the will. The homestead farm was sold and conveyed by the executors, in 1834, to John and Abram Laroe, two of the testator's sons. At the date of this sale, three of the testator's children were minors, and were entitled, by the terms of the will, to their respective shares of the estate. To secure their portions, a bond and mortgage was given by the purchasers to the executors, in the sum of \$1656.68, conditioned to pay to the two sons, Peter and Jacob, \$613 each, and to the daughter, Hannah, \$430.68, when, by the terms of the will, they could be entitled to receive their respective portions, the interest in the meantime to be paid to the executors or to any other person legally authorized to receive it. This bond and mortgage were held by the executors at the time of their final settlement, the children still being in their minority, and constituted a part of the estate in the hands of the executors. About the date of the settlement in the year 1836, the mortgagors conveyed the farm to James S. Laroe, one of the executors and mortgagees, the mortgage debt being suffered to remain as a part of the purchase money, and the mortgage left uncanceled upon record. At this period the bond and mortgage were in the hands

Samuel S. Laroe, who appears to have delivered the bond to the obligors, but retained the mortgage. On the 15th of March, 1840, the legatees still being under age, the mortgaged premises were conveyed by James S. Laroe to Alexander Davis, who refused to take title until the farm was free from encumbrance. The mortgage was thereupon surrendered by James S. Laroe, and on the 1st of April was cancelled of record.

In the spring of 1850, the farm was sold and conveyed by Alexander Davis to Brown and Bigelow. Jacob Laroe, one of the complainants and one of the *cestui que trust* under the mortgage, objected to the sale; but after consultation the objection was waived, and the title was permitted to be made. In the fall of 1850, James S. Laroe, one of the executors, left the state of New Jersey

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and went to Texas, where he died on the 18th of March, 1854. On the 9th of June, 1854, this bill was filed against Marcus B. Douglass, the surviving executor, for the recovery of the shares of Jacob and Hannah, two of the legatees and two of the *cestui que trusts* under the bond and mortgage taken by the executors, in 1834, for the security of those shares.

Upon this state of facts the first and most material question in the cause is, whether the surviving executor is liable for those legacies to the complainants, admitting them to remain unpaid. The bond and mortgage given in 1834 for the security of the legacies were made to the executors jointly. The final settlement made by the executors in 1836 was a joint settlement, and the decree finds the balance to be in the hands of the executors. Up to this period Douglass appears to have had an active participation in the management of the estate, if not its entire control. The bond and mortgage were drawn by him. After the settlement it does not appear that he had any further active participation in the business. He removed from the neighborhood, and the bond and mortgage passed into the hands of his coexecutor.

The law is well settled in this state, that when executors exhibit for settlement a joint account, and when, by the decree of the Orphans Court, such account is finally settled and allowed, the executors are jointly charged with the balance thus ascertained to be in their hands. The decree is in the nature of a judgment. By the terms of the statute it is conclusive upon all parties, none of whom will be permitted to set up any matter in avoidance of its operation.

This doctrine was distinctly announced by Chancellor Williamson in *Dunn v. Executors of Dunn*, and although that decree was reversed by the Court of Appeals, the same doctrine was subsequently held, and the principle upon which it rests distinctly enunciated by Chancellor Vroom in *Fenimore v. Fenimore*, 2 *Green's Chan. R.* 296, and *note*.

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If the executor is unwilling to incur joint liability with coexecutor he may avoid it by accounting separately the funds which come to his hands. *Bellerjeau v. Executors of Kotts*, 1 South. 359.

If he account jointly, and submit to a decree finding the funds in the hands of the executors jointly, the parties interested may rely on the decree, and are not driven to the necessity of discovering in whose hands the funds are, or in what proportion the executors are liable for their loss.

But it is urged that, after the money had been invested for the benefit of the minor legatees, and after the final settlement of the estate, the executors were divested of their character and liability as executors, and became simply trustees for the estates of the minor children. If a change of character involves a change of liability to the legatees it will be difficult to sustain the position here upon principle or upon policy. By the joint settlement and decree thereon they are jointly liable as executors. Can it be that they are absolved from that liability by simply loaning the money in their own names as executors for the benefit of the parties entitled? The bill is against the defendant as executor for the recovery of legacies. He has not been divested of his office or absolved from his duties as executor. The legacies have never been paid either to the legatees or to their trustees. How, then, is the defendant to claim exemption from liability on the ground that he is not executor but a trustee? No such defence is raised or suggested by the answer, nor does it seem to be in any view tenable. But admitting, for the sake of the argument, that the defendant was before the court, not as executor but as surviving trustee, is he exempt from liability in that character? It is in evidence that he permitted the securities for this money to be taken by his cotrustee, by whom they were afterwards improperly given up and cancelled. That cotrustee became the owner of the mort-

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gaged premises. In his hands the encumbrance of the mortgage debt remained upon the estate. When he was about to make sale Douglass was apprized of it, and notified the intended purchaser of the encumbrance. His cotrustee thereupon called upon Douglass, informed him that he could not make sale except by cancelling the mortgage, and that he would pay the *cestui que trusts*. If Douglass did not consent he did not actively oppose the meditated wrong. He afterwards wrote to the clerk of the county, requesting him not to suffer the mortgage to be cancelled of record. He received a reply from the clerk, that if the mortgage was presented to him cancelled he did not know that he could refuse to cancel it of record. He had then full knowledge of the meditated wrong, and he was bound to interfere actively to prevent it. He might have restrained the completion of the sale and the fraudulent surrender of the mortgage. He might, at least, have given notice to the intended purchaser of the nature of the encumbrance upon the property, of his dissent from the cancellation of the mortgage, and thus have continued the equitable lien notwithstanding the surrender of the bond and the fraudulent cancellation of the mortgage. But the evidence shows that he stood unresistingly by and permitted the wrong to be perpetrated.

The rule in England upon this subject is very strict. Where several trustees are appointed, and have accepted the trust, it is the duty of each one to protect the trust property from the acts of his colleagues; and if, through the neglect of this duty, any of the trustees have been enabled to misappropriate or otherwise occasion any loss to the trust estate, the others, as a general rule, will be personally answerable to the *cestui que trusts* for the amount of the loss, although they had not been engaged in or benefited by the breach of trust.

So if a trustee stand by and suffer his cotrustee to retain the exclusive possession and control of the trust

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ds, and they are lost or wasted by the cotrustee, the acting trustee will be decreed personally to make good loss. *Hill on Trustees* 309.

The rule, as stated by Mr. Justice Story, is somewhat rigid. A trustee must act with reasonable diligence, in case of a joint trust must exercise due caution and diligence in respect to the approbation of and acquiescence in the acts of his cotrustees; for if he should deliver over the whole management to the others, and betray ine indifference or gross negligence in regard to the interests of the *cestui que trusts*, he will be held responsible. *2 Story's Eq.* § 1275.

So if a trustee, by his own negligence, suffers his cotrustee to receive and waste the trust fund when he has means of preventing such receipt and waste by the exercise of reasonable care and diligence, he will in such case be held personally responsible for the loss. *Story's* § 1283.

Therefore, the defendant could divest himself of the character of executor, it is not perceived how, under the circumstances in this case, he could be relieved from liability. The claim is not barred by the statute of limitations, can it be rejected as a stale claim, not entitled to the protection or favor of a court of equity. One of the complainants came of age in 1841, the other in 1845. Payments were made by one of the executors on account of the claims as late as 1850, a short time before he finally left the state. The bill was filed against the surviving executor in 1854, within three months after the death of James S. Laroe, and within four years of the date of the last payment.

Among the various grounds of defence presented upon argument, it was urged that Douglass was discharged from liability on the ground that at the sale of the mortgaged premises by Davis, Jacob, one of the complainants, objected to the sale, but afterwards waived his objection, consented (in the language of the witness) to look to

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his brother James for the balance of his share of his father's estate. If the mortgage had been cancelled, the equitable lien of the *cestui que trusts* upon the mortgaged premises released by their own act, there might have been some weight in the objection. But this sale took place, and the alleged conversation occurred in 1850, ten years after the mortgage had been cancelled by the consent, express or implied, of both the mortgagees, and when the lien of the mortgage debt, legal or equitable, was entirely extinguished. The objection or consent, therefore, of the *cestui que trusts* to the sale was nugatory and could affect no existing right. Nor could his agreeing to look to his brother, and not to the land, release the coexecutor from any existing liability. The coexecutor was not present, and the statement was made with a totally different purpose in view. It is highly probable that, at the time, the legatee was ignorant that the coexecutor was in any wise liable for the legacies due from the estate.

The evidence now before the court does not show that the legacies have been paid in full. The complainants are entitled to an account. There must be a reference to a master to ascertain the amount, if any, due to the complainants respectively.

ZABRISKIE vs. THE JERSEY CITY AND BERGEN RAILROAD COMPANY.

A court of equity will grant an injunction to restrain a public nuisance at the instance of a party who sustains a special injury. But a mere diminution of the value of the property of the party complaining by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.

The location of a railroad through a public street in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment.

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Weart, for complainant.

Zabriskie, for defendants.

THE CHANCELLOR. The complainant is the owner of four building lots, on the south side of Grand street in Jersey City, lying between Mill creek and Varick street. The defendants are a body politic, incorporated by an act of the legislature of this state, approved on the 15th of March, 1859, with power to construct a railroad from some point on the Kill Van Kull, at or near Bergen Point, to the Newark turnpike, with branches extending to the ferries south of the city of Hoboken.

By an ordinance of the common council of Jersey City, approved on the 20th of December, 1859, the defendants were authorized to lay a single track of iron rails, not exceeding a gauge of 4 feet 10 inches in width, through the centre of Grand street, from its junction with Washington street, to the westerly boundary of the city. And by an act of the legislature, approved on the 17th of March, 1860, it is enacted that the Jersey City and Bergen Railroad Company, in laying their rails and constructing their roads in the streets of Jersey City, shall be subject to such conditions as the common council of said city, by the ordinance granting consent to lay such rails and construct such road, shall have imposed or shall impose upon said company.

That part of the defendant's track extending through Grand street from Grove street westerly to Mill creek is constructed upon the road of the Jersey City and Bergen Point Plank Road Company, under an agreement for that purpose between the two companies. The plank road was constructed upon a public highway by authority of an act of the legislature, and with the approbation of the townships of Bergen and Van Vorst, in which at the time the road was located. In the year 1855, that part of Grand street between Grove street and Mill creek was included within the limits of Jersey City, and has since

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been filled in, graded, and widened by the city authorities at the expense of the owners of lots upon the street.

The railroad track was laid, and the cars were running upon it, previous to the 13th of July, 1860, when the complainant's bill was filed. The *gravamen* of the complaint is, that the railroad track is not laid in the centre of Grand street, as required by the ordinance, but south of the centre line of the street, and so near to the curb-stone as to be a public nuisance and an irreparable injury to the lots of the plaintiff, in front of which it passes. The prayer of the bill is that the defendants may be enjoined from continuing their railroad track as laid down, and from running the cars over the same.

There is no question of the power of the court to grant the injunction prayed for in the complainant's bill. The court will grant an injunction to restrain even a public nuisance at the instance of a party who sustains a special injury from such nuisance. *Crowder v. Tinkler*, 19 Vesey 617; *Corning v. Lowrey*, 6 Johns. Ch. R. 439.

It is equally clear that the track of the railroad through that part of Grand street in front of the complainant's lots is not located in compliance with the requirements of the city ordinance. It is not in the centre of the street, as the ordinance directs it shall be laid, but south of it, and nearer to the property of the complainant.

Nor is it perceived that the fact, that the railroad track, in that part of the city, is located upon the plank road by virtue of an agreement with the plank road company can excuse or justify a violation of the city ordinance. The plank road was laid by legislative sanction upon a public highway. That public highway has since been included within the city limits, and as graded and widened, constitutes one of the city streets. It must be subject, as other streets are, to be regulated and controlled by the city authorities, saving to the plank road company their corporate rights and privileges.

I am nevertheless of opinion that this injunction must

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be denied because the nature and extent of the injury complained of is not such as to warrant the interference of the court.

The injury, as stated in the complainant's bill, is that, by reason of the construction of the railroad south of the centre line of the street, and near to the line of the curb, the complainant will have no means of depositing building materials on the street; that the running of the cars will prevent ready access to the complainant's lots with horses and carriages, and that horses, carriages, and carts will not be permitted to stand in the street in front of the complainant's lots for the purpose of receiving and discharging passengers, goods, and merchandise, and carrying on the ordinary business of life, by means whereof the complainant's property is greatly depreciated in value, and the complainant deprived of the ordinary use of the same.

At the time the bill was filed the complainant's lots lay west of the improved part of Jersey City. They were located in a salt marsh. There was not a building or other improvement upon either of them. There is no improvement upon them now, so far as appears by the evidence in the cause, except a frame slaughter house upon one of them. There is no present necessity for discharging passengers, goods, or merchandise there in such numbers or quantity that its interruption will prove a serious detriment to the complainant's rights. The complainant alleges, indeed, that the city is extending in that direction; that buildings are erected within one or two blocks of it, and that the complainant contemplates building at no remote period. It is obvious, from the evidence, that it is not the location of the railroad track that produces the injury complained of, but it is the running of the cars. The rails will not interfere with the deposit of building materials nor with the lading or unlading of merchandise. It is the running of the cars and the necessity of keeping the track clear for their frequent pas-

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sage that creates the difficulty. And why should the cars be stopped running to-day, a line of public travel be interrupted, and the public convenience be prejudiced because next month or next year it may occasion inconvenience or loss to the complainant? This aspect of the case is presented very clearly in the complainant's own evidence. Mr. Manners, whose opinion as an intelligent witness is entitled to great respect, on being asked whether the railroad, as located, is an irreparable injury to the complainant's property, answers—"I consider it a very great injury, and a very great injury, whenever the property is built upon and occupied for business." An ingenious effort was made to avoid this difficulty by attempting to prove that the present market value of the lots was seriously depreciated by the location of the track. The attempt was not successful, and if it had been it would not have overcome the difficulty. A mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Attorney General v. Nichol*, 16 Vesey 342; *2 Story's Eq.* § 925. It is too obvious to admit of dispute that there is no present injury to the plaintiff's property, occasioned by the location of the road or the running of the cars, which warrants the interference of this court.

There is a further reason why this injunction should be denied. The location of this railroad not in accordance with the city ordinance, is charged in the complainant's bill to be a public nuisance. If it operates as prejudicial to the rights of property owners on the street as the bill alleges it is a public nuisance, and indictable as such; and yet although the track had been laid for months, and the road in active operation, it does not appear that it has ever been complained of, much less convicted as a public nuisance. It is a settled rule of the court in cases of public nuisance to interfere on the complaint of an individual only in very clear cases of serious and special injury to the complainant. It ought not to interfere when

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the object can be as well attained in the ordinary tribunals. *Attorney General v. New Jersey Railroad and Transportation Company*, 2 *Green's Ch.* 136; *Angel on Water-courses*, § 566.

This whole subject, moreover, is entirely under the control of the city council. They may at any time require the road to be constructed in compliance with the ordinance. The presumption is that they will do so whenever its present location works a great public or private wrong. In the mean time, there can be no necessity for the interference of this court.

The injunction must be denied and the complainant's bill dismissed with costs.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

MAY TERM, 1861.

PHILIP GARISS vs. ELIAS L. GARISS and others.

In case of a bill for specific performance of an agreement for the sale of land containing averments of a parcel enlargement of the time of payment, possession, and the erection of permanent improvements, the injunction will be dissolved upon the filing of an answer denying those averments.

It is not necessary that affidavits annexed to answers should be taken upon notice, or that copies should be served on the adverse party.

Where a motion is made to dissolve an injunction upon the answer, affidavits annexed to the answer can only be read in reply to affidavits annexed to the bill.

Mc Carter, for motion.

Kingman, contra.

THE CHANCELLOR. The bill was filed to compel the specific performance of an agreement for the sale and conveyance of real estate. The agreement bears date on the 9th of April, 1851. The purchase money was to have been paid by the complainant, and the deed executed to

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him on the 1st of April, 1854. The purchase money was not paid according to the terms of the agreement, but the bill charges that, by a parol agreement between the parties, the time of performance was extended; that the defendant continued to pay interest upon the purchase money; that he remained in possession, and made valuable improvements upon the premises upon the faith of the agreement, and that he also paid a part of the principal of the purchase money. That the complainant continued in an undisturbed possession of the premises under the agreement until 1859, when the defendant, Elias L. Gariss, sold and conveyed the premises to a third party, who took title with full knowledge of the complainant's equity, and who now threatens forcibly to eject the complainant from his possession. The bill asks a specific performance of the contract and an injunction to restrain the defendants from interfering with the complainant's possession. The party with whom the agreement to purchase was made and the party to whom the conveyance has since been executed have answered separately, and now ask a dissolution of the injunction.

The whole equity of the bill rests upon the allegations that there was a part performance of the parol agreement to extend the time for the execution of the contract of sale; that the complainant continued in possession, and made permanent improvements on the premises, relying upon the faithful execution of the agreement.

All these facts are fully and explicitly denied by the answers and by the accompanying affidavits. The answer of Elias L. Gariss, with whom the original contract was made, denies that there was any agreement to extend the time for the payment of the purchase money; but avers that the complainant, having failed to perform the contract on his part by paying the purchase money, continued in possession of the premises as a tenant, paying rent from the first of April, 1854, until 1859, when, the premises having been sold to a third party, the complain-

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ant surrendered possession to a third party, who has since occupied the premises; that the building erected by the complainant was designed to have been erected upon other lands belonging to the complainant, but the boundary not being well defined was erected partly upon the lands of the defendant. The mistake having been discovered, the defendant, in conveying his lot, so altered the boundary as to leave the building entirely upon the complainant's premises. These facts are fully confirmed by the answer of the other defendant. There is no ground for continuing the injunction.

The affidavits annexed to the answers are inadmissible. It is not necessary that affidavits annexed to and filed with the answer should be taken upon notice or that copies should be served upon the adverse party. But where a motion is made to dissolve an injunction upon the answer, affidavits annexed to the answer can only be used in reply to affidavits annexed to the bill. *Rule IX, § 4.* If the complainant relies upon the averments of the bill, and his own affidavit in support thereof, without the aid of the affidavits of third parties annexed thereto, the defendant must rely solely upon his answer without resorting to the affidavits of third parties.

The injunction is dissolved with costs.

THE NEW JERSEY ZINC COMPANY vs. THE NEW JERSEY
FRANKLINITE COMPANY.

THE BOSTON FRANKLINITE COMPANY vs. THE NEW JERSEY
ZINC COMPANY.

The usual and appropriate meaning of the word "premises" in conveyances is, "the thing demised or granted by the deed."

It is the inflexible rule of law that a deed, except in cases of latent ambiguity, must be construed according to the legal effect and meaning of its terms unaffected by extrinsic evidence.

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an agreement to transfer the property and stock of an incorporated company cannot affect its legal existence, nor will the actual transfer of the real and personal estate of the corporation, including the stock itself, extinguish its charter.

Sussex Zinc and Copper Mining and Manufacturing Company conveyed to the New Jersey Zinc Company "all the zinc and other ores, *both franklinite and iron ores*, found or to be found in or upon certain tracts; the title and interest of the former company became afterwards legally vested in the Boston Franklinite Company. It appeared that the two ores, zinc and franklinite, existed in the mine in close mechanical combination, so that the one could not be removed without the other; but that at the date of the conveyance the masses or veins of the ores in question were regarded and known as franklinite. *Held*—That the exception in the deed was not limited to the franklinite and iron ores, where they existed *separate and apart from the zinc*.

That the grantor retained a freehold estate in the thing excepted, and the grantee acquired a freehold estate in the thing granted, and that the words "zinc ores" and "franklinite and iron ores" were used as a description of the land granted and reserved.

That in construing the deed reference must be had, in order to ascertain the intention of the parties, to the existing state of knowledge of the subject matter, the received meaning of the terms employed, and the usages prevailing at the date of the conveyance.

That by the term "zinc ores," as used in the deed, was meant those tracts in which the ore of zinc was the predominating one, and by franklinite not the pure mineral of that name, which was never found except in small and detached specimens, but those veins in which franklinite predominated, and which were known and designated as franklinite ore. That a mine with mining privileges is not a mere license to take away ore, or the grant of an easement, but of a part of the freehold.

That the court of equity will rarely interpose by injunction to restrain the working of mines until the right is established at law.

Hamilton and McCarter, for Franklinite Company.

Bradley and Zabriskie, for Zinc Company.

THE CHANCELLOR. On the 24th of July, 1857, the New Jersey Zinc Company filed their bill in this court for an injunction to restrain the New Jersey Franklinite Company from mining and carrying away zinc ore, to which the complainants claimed title, from part of a tract known as the Mine Hill farm, in the county of Sussex. The complainants, by their bill, claimed title to all the metals,

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or ores containing metals, found or to be found upon the tract in question, "excepting the metal or ore called franklinite and iron ores, *when it exists separate from the zinc.*" They insisted that the true intent and meaning of the several indentures under which they claim title is, that whenever, on the said premises, there is an admixture of zinc or other ore with the franklinite, they have the sole and absolute right to the said ore; and that the Franklinite Company have no right to mine and carry away any of the zinc ores found on said premises, no matter with what quantity of franklinite they may be found in connection. They claimed that zinc was the predominating ore in the opening where the Franklinite Company were mining; that the defendants had no right to the said ores, and prayed an injunction to restrain them from mining or carrying away from the said tract any of the zinc ores or other ores found upon the said tract, except franklinite and iron ores, when they exist separate from zinc ore. An injunction issued pursuant to the prayer of the bill. Upon the coming in of the answer, the injunction was modified so as to restrain the defendants from mining or carrying away any of the zinc or other ores found upon the premises, except franklinite and iron ores.

The Franklinite Company, by their answer, admitted that the complainants were entitled to all the zinc and other ores upon the said tract except franklinite and iron ores, but claimed title in themselves to all the franklinite and iron ores existing therein. They alleged that the veins of ore upon the Mine Hill tract were franklinite veins, from the preponderance of that ore therein, the ore in excess giving name and character to the vein, except in the case of the precious metals, gold and silver being found in appreciable quantities; that franklinite ore has never been discovered separate from zinc ore, and that the respective veins of zinc and franklinite in the county of Sussex contain both metals mechanically combined,

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the vein taking its name and character from the predominating ore.

Subsequent to the filing of the answer, the title of the New Jersey Franklinite Company, under the foreclosure and sale of a mortgage executed by them, became vested in the "Boston Franklinite Company," a corporation organized under the laws of this state. On the 17th of October, 1860, the Boston Franklinite Company filed a bill, in the nature of a supplemental bill, against the parties in the foregoing suit, therein alleging that they have become seized of and entitled to all the ores and minerals formerly owned by the New Jersey Franklinite Company in the Mine Hill tract, concerning which the controversy in said suit had arisen; that, by virtue of such title, they are the sole owners, and have the exclusive right to all the franklinite and iron ores found in that part of the Mine Hill tract described in the original bill of complaint, whether said franklinite and iron ores are found mixed with zinc ores or separate therefrom; and that, having acquired title pending the suit against the New Jersey Franklinite Company, they cannot, by reason of the said injunction, safely commence operations in mining the said ores, until the title thereto shall be determined by the court.

They charge that the New Jersey Zinc Company are mining and carrying away large quantities of the ores in controversy, which they insist is franklinite ore and the property of the Franklinite Company, under the pretence that the said ore is red oxide of zinc, because of the admixture of a small quantity of red oxide of zinc therein, under the claim set up by them, in their original bill, that whenever there is any zinc ore found on Mine Hill, they are entitled to take the same, no matter how much franklinite may be found in connection therewith. They pray an account of all the ores carried away, and that the Zinc Company may be restrained from mining or carrying away any franklinite or iron ore found on Mine Hill afore-

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said, or from mining or carrying away any of the ores or minerals in controversy between the parties in the original cause. An injunction issued pursuant to the prayer of the bill.

The New Jersey Zinc Company, by their answer to the supplemental bill, assert and contend that the Boston Franklinite Company are only the owners of the franklinite and iron ores found or to be found on the said premises when the said franklinite and iron ores exist separate and distinct from the zinc; that by means of more extended openings and workings of the main vein of ore on Mine Hill, and more accurate examinations and analyses of the different portions thereof, it has been ascertained that no part of said vein consists of franklinite or iron ore separate and distinct from zinc, and therefore that no part thereof can or does belong to the Franklinite Company, but the whole thereof belongs to the Zinc Company.

They further allege, that whether a particular ore shall be called a zinc ore, or a franklinite or iron ore, does not depend on the preponderance in weight of zinc or oxide of zinc on the one hand, or of franklinite or oxide of iron on the other, but on the relative value of the respective products, after taking into account the expense of extracting the same. And they deny that franklinite is the principal ingredient taken by them from the said tract. A large amount of evidence has been taken in support of the claims of the respective parties, and the causes are now brought on for final hearing upon the pleadings and proofs.

Two issues are made by the pleadings, upon the decision of which the rights of the parties and the result of the cause depend.

I. Are the Boston Franklinite Company entitled only to the franklinite and iron ores found on the said tract, when the same exist separate and distinct from zinc.

II. Is the ore in question a zinc ore, within the true

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construction of the deeds under which the Zinc Company claim title.

The whole controversy depends upon the decision of one or both of these issues. If the first issue is answered in the affirmative, if the Franklinite Company are entitled only to the franklinite and iron ores when existing *separate and distinct from zinc*, they have no title to the ores in controversy; for it is alleged by both parties, and shown satisfactorily by the evidence, that franklinite is always found in the mines of Sussex in mechanical combination with zinc, and never separate and distinct from it, in masses sufficient to make it worth the labor of mining. Neither party claims title to the surface of the land in which the ores are found. The Zinc Company have an unquestioned title to all the metals, or ores containing metals, existing in the premises, excepting franklinite and iron ore. The Franklinite Company have title to the franklinite and iron ores when they exist separate and apart from zinc. Who has title to the franklinite and iron ores when they are found in mechanical combination with the zinc? An answer to this inquiry renders necessary a recourse to the origin and history of the titles of the respective parties to the premises in dispute.

On the 10th of March, 1848, Samuel Fowler, then being the owner of the Mine Hill tract, upon which the ores in question are found, by deed, executed by himself and Henrietta his wife, conveyed to the Sussex Zinc and Copper Mining and Manufacturing Company, for the consideration of twenty thousand shares in the capital stock of the said company, "all the zinc, copper, lead, silver, and gold ores, and also all other metals, or ores containing metals, (excepting the metal or ore called franklinite and iron ores, when it exists separate from the zinc,) existing, found or to be found on five contiguous tracts in the township of Hardyston," one of which is the Mine Hill farm, including the tract in question.

On the same day, by deed of even date, executed by and

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between the same parties, Fowler and wife conveyed to the Sussex Zinc and Copper Mining and Manufacturing Company "all the metal, mineral, or iron ore, usually designated and known by the name of franklinite, found to be found on, upon, or in a certain tract of land," in the said deed particularly described, being a portion of the Mine Hill tract, and included, as it is understood, within the limits of the tract specified in the first mentioned deed. This last deed it is admitted does not cover the premises in controversy, and is in no wise material to the present inquiry, except as a part of the history of the title, and as illustrating, by the phraseology of the grant in contrast with the terms of the first deed, that the significance of the exception, which constitutes the germ of this controversy, was fully appreciated by the parties, or at least by the grantor. In the one deed, a conveyance is made of all the zinc and other metals, or ores containing metals, existing in the land, "excepting the metal or ore called franklinite, when it exists separate from the zinc," in the other, the grant is of "all the metal, mineral, or iron ore usually designated and known by the name of franklinite;" and the language of the exception in the first deed is made the more significant, and the importance attached to it by the parties rendered more obvious, by a recurrence to the original deed, from which it appears that the language of this exception, which occurs twice in the instrument, was altered after it was drawn and before execution. As drawn, the clause excepted the franklinite, when it exists separate from *other ores or metals*, or as it was afterwards expressed, "excepting the ore called franklinite, when it exists in a separate distinct state from other ores." In both clauses the words *other ores* are erased, and the words "*the zinc*" inserted. The significance of this alteration cannot be overlooked.

Samuel Fowler, the grantor in these deeds, having, after the making thereof, purchased and procured releases and deeds of quit-claim and grants of and to the said pre-

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mises, or of some interest therein, or some parts thereof, by a deed of confirmation, bearing date on the — day of March, 1849, acknowledged and recorded on the 26th day of May, 1849, ratified and confirmed to the grantees the aforesaid deeds, and the grants and conveyances of the premises therein, or in either of them described and conveyed, and all the rights, privileges, and immunities therein, or in either of them named and granted. This deed, like the last preceding deed, is material to our inquiry only because it recites at length and ratifies the deed of the tenth of March, 1848; thus adopting and reaffirming the phraseology of the exception a year after the deed was executed.

This deed, by its terms, conveyed to the Sussex Zinc and Copper Mining and Manufacturing Company all the metals and ores containing metals existing in the premises, excepting the franklinite, when it exists separate from the zinc. The franklinite and iron ores, when found in mechanical combination with zinc, were not excepted, and passed by the terms of the grant to the grantees.

On the 8th of March, 1852, the Sussex Zinc and Copper Mining and Manufacturing Company, being seized of all the rights acquired by virtue of the foregoing deeds of conveyance, by deed of that date, conveyed to the New Jersey Zinc Company "all the zinc and other ores, except franklinite and iron ores," found or to be found in or upon the premises therein described, which are the same premises described in the first mentioned deed from Fowler to the Sussex Company of the tenth of March, 1848. And by another deed, also bearing date on the same eighth of March, 1852, the Sussex Zinc Company also conveyed to the New Jersey Zinc Company "all the metal, mineral, or iron ore, usually known or designated by the name of franklinite, found or to be found on, upon, or in all that certain tract of land" therein described, and being the same tract described in the second deed from Fowler to the Sussex Company of the tenth of March,

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1848. These two deeds to the New Jersey Zinc Company of the eighth of March, 1852, purport to convey substantially the same rights with those conveyed by the two deeds of the tenth of March, 1848, from Fowler to the Sussex Company, except that in the deed to the Zinc Company, which covers the premises in dispute, the words "when it exists separate from the zinc," found in the deed from Fowler annexed to the exception of the franklinite, are omitted. The language of the description of the premises granted in the deed from Fowler to the Sussex Company is, "all the zinc, copper, lead, silver, and gold ores, and also all other metals or ores containing metals (except the metal or ore called franklinite, and iron ores, when it exists separate from the zinc) found or to be found," &c. In the deed from the Sussex Company to the New Jersey Zinc Company, purporting to be for the same premises, the phraseology of the description is, "all the zinc and other ores, *except franklinite and iron ores*, found or to be found," &c. The distinction in the effect, as well as in the terms of the two deeds, is too clear to admit of controversy. In the one, the exception extends only to the franklinite and iron ores *when it exists separate from the zinc*—in the other, all the franklinite and iron ores are excepted. By the one, all the franklinite and iron ores found in mechanical combination with the zinc passes to the grantee—in the other they do not.

After the description of the premises granted, the deed to the New Jersey Zinc Company contains the usual clause, in these words: "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging," &c., "and also all the estate, right, interest, property, claim, and demand whatsoever, as well at law as in equity, of the said parties of the first part of, in, and to the above described *premises*, and every part and parcel thereof, with the appurtenances." It is urged that this language includes all the estate and interest of the grantors in the premises, and operates to pass to the

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rantees all the franklinite and iron ores. But this construction would destroy the exception, and would operate to pass the absolute fee in the land itself. The term *premises*, in common parlance, is used to signify the land, with its appurtenances; but its usual and appropriate meaning in conveyance is "*the thing demised or granted by the deed.*" In this sense the term is here used. This clause was not intended to alter or enlarge the extent of the grant, but simply to convey all the grantor's interest in the thing granted. The same term is used in the deed, in the *habendum* clause, with obviously the same meaning: "to have and to hold all and singular the above mentioned and described *premises*, with the appurtenances." Its meaning in this clause, by well settled rules of construction, must be limited to mean the thing granted.

Two other grounds are taken in regard to the construction and effect of this deed from the Sussex Company to the New Jersey Zinc Company. It is insisted—

1. That the deed is to be interpreted by the aid of the previous agreement between the parties, in fulfilment of which the deed was executed.

2. That the alteration in the terms of the grant were fraudulently made in violation of the agreement under which it was executed, and that, if need be, the court will reform the deed to conform to the intention of the parties.

In regard to the first objection, it is a well settled and inflexible rule of law, that except in cases of latent ambiguity, the deed must be construed according to the legal effect and meaning of its terms unaffected by extrinsic evidence. The terms of the deed in question are clear. There is no doubt as to their meaning, and no room for construction apart from their obvious and legal import. If not in accordance with the true meaning and intention of the parties, the proper and only remedy is to reform the instrument, not to subvert its legal operation.

Was the deed fraudulently made, or, by mistake, not

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made in accordance with the intent and agreement of the parties? and if so, may it be reformed to accord with such intention? Neither of these grounds are suggested in the original bill filed by the Zinc Company; on the contrary, they based their title and claim to relief upon the legal effect and operation of the deed itself. The New Jersey Franklinite Company, in their answer to the bill, say, "that in the conveyance of zinc ores on Mine Hill to the New Jersey Zinc Company, the description in the older deeds, "excepting franklinite or iron ore, when they exist separate and apart from zinc ore," was designedly changed, after full discussion in presence of both boards, by omitting the words "when they exist separate and apart from the zinc ore;" because the reservation qualified by these words became a contradiction and a nullity, and because the Franklinite Company intended to reserve to itself all the franklinite ore, whether connected with zinc or not. And that the directors of the New Jersey Zinc Company were present, and consented to and approved the striking out of the said words from the description in the original deed from Fowler and wife for the reasons aforesaid.

In the answer of the Zinc Company to the supplemental bill filed by the Boston Franklinite Company these allegations in the answer of the original defendants are denied, and it is alleged that the resuscitation of the Sussex Zinc and Copper Mining and Manufacturing Company, under the name of the New Jersey Franklinite Company, and the setting up by them of a claim to all the franklinite and iron ores on Mine Hill farm, whether existing separate and distinct from zinc or not, was a fraud on the Zinc Company; and if the deed from the Sussex Company to the Zinc Company of the eighth of March, 1852, does not, by a fair construction thereof, (as the defendants believed, and still believe it does,) fully convey all the ores and rights which were conveyed to the Sussex Company by Fowler and wife by the deed of

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March 10th, 1848, the same ought to be reformed so as to correspond to the true intent and meaning of the agreement between the parties.

It is satisfactorily shown that the Sussex Zinc and Copper Mining and Manufacturing Company, being the owners of ores and mineral rights in Mine Hill and its vicinity, by grant from Fowler and the New Jersey Exploring and Mining Company, (the title of which company has since been changed to the New Jersey Zinc Company) owning ores and mineral rights at Stirling Hill, and being engaged in the manufacture of zinc at Newark, on the fourth of September, 1851, an agreement was entered into between the two companies, for their mutual interest, to unite their properties and to carry on their joint business under one organization, that of the New Jersey Exploring and Mining Company. The Sussex Company agreed to convey all their real and personal estate and all their capital stock not issued to individuals, and the New Jersey Exploring and Mining Company agreed to admit the whole stock of the Sussex Company to the same dividend as the stock of the New Jersey Company; the holders of the stock of each company to be entitled equally to all dividends, and to all the property, real and personal, of the two companies, the union being based upon the principle of entire equality between the stockholders of each company. The agreement recites that it was contemplated to apply to the legislature for an increase of the capital stock of the New Jersey Exploring and Mining Company, and in case of such increase the stock of the Sussex Company was to be surrendered, and the stock of the New Jersey Company issued in lieu thereof. The real and personal estate of the Sussex Company was to be transferred to the New Jersey Company, thus forming a complete union, and bringing together, and uniting under one charter, all the property, rights, and advantages owned by both said companies. This agreement is in

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writing, and is formally executed under the seal of both companies.

By an act of the legislature, approved on the twelfth of February, 1852, the name of the New Jersey Exploring and Mining Company was changed to that of "the New Jersey Zinc Company." The said company were authorized to purchase and receive, and the Sussex Zinc and Copper Mining and Manufacturing Company were authorized to transfer, all the mines and mineral rights, or any part thereof, then owned by the latter company, upon such terms as the companies might agree upon; the capital stock of the company was authorized to be increased, and its stock issued as contemplated by the agreement between the two companies.

In further execution of the agreement between the parties, the Sussex Zinc and Copper Mining and Manufacturing Company executed to the New Jersey Zinc Company the two deeds of the 8th of March, 1852, already referred to, and transferred to them all the capital stock of the company not standing in the hands of private stockholders. Most of the stock in private hands was also surrendered, and new stock issued. A few of the shares, however, were not surrendered, nor was the charter of the company or its corporate rights surrendered or transferred. But on the 26th of January, 1853, a further supplement to the act was passed, by which the name of the Sussex Zinc and Copper Mining and Manufacturing Company was changed to that of the New Jersey Franklinite Company, and its capital stock increased to one million two hundred thousand dollars (\$1,200,000). Under this charter, the New Jersey Franklinite Company claimed the right to exercise the corporate rights and franchises of the Sussex Zinc and Copper Mining and Manufacturing Company, and to hold title to the ores in question. It is obvious that the deed for the land was not in accordance with the terms of the agreement between the companies; and the withholding from the conveyance a part

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of the property, and the resuscitation of the Sussex Company under a new name, is charged to be illegal and fraudulent.

There is nothing in the evidence which renders the charter of the New Jersey Franklinite Company inoperative, or which deprives them of the power of exercising the corporate franchises, or enjoying the rights of property which were held by the Sussex Zinc and Copper Mining and Manufacturing Company when the title of the company was altered.

I think it clear that the agreement between the Sussex Company and the New Jersey Exploring and Mining Company involved a transfer of the control of that charter to the latter company. There was, however, no express agreement for the sale or for the extinguishment of the franchises of the company. The chartered rights and privileges of the company, if the agreement had been carried into effect, would have been owned and controlled by the owners of the stock. A mere agreement to transfer the property and stock of the company could not affect its legal existence, nor could the actual transfer of all the real and personal estate of the corporation, including the stock itself, if legal, have extinguished the charter. But the agreement was never carried into effect. Neither the entire stock nor all the property of the corporation were transferred, in pursuance of the agreement, at the time the name of the company was changed. The bill admits that some of the shares were still outstanding, and it appears, from the evidence, that some of the directors delayed transferring their stock till the meeting of the legislature for the express purpose of having the charter renewed. The title to the ores in dispute was not transferred. The act of February 12th, 1852, the passage of which was contemplated in the agreement between the companies, and which was designed to carry the agreement into effect, does not appear to contemplate the necessary extinction of the Sussex Company. It simply au-

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thorizes a transfer of all its mineral rights, or any portion thereof.

The legislature, by the passage of the supplement of 1853 to the charter of the Sussex Company, changing its name to the New Jersey Franklinite Company, and enlarging its capital stock, recognised and affirmed the continuance of the corporation and of its chartered rights and privileges. There is nothing that renders the act of the legislature legally inoperative. The legal existence of the Franklinite Company as a corporation has been unquestioned from that day to this, and is recognised by the Zinc Company themselves. The legal existence of the company, and their right of acquiring, holding, and transmitting property, in accordance with the terms of the charter originally granted to the Sussex Company, cannot now be doubted.

In the original bill of the New Jersey Zinc Company, it is alleged that the act of the legislature of 1853, changing the title of the Sussex Zinc and Copper Mining and Manufacturing Company to the New Jersey Franklinite Company, was passed at the instance and request of the first named company. In their answer to the supplemental bill, it is alleged that this admission was made by mistake, and that in fact the act was procured by persons having no interest in the stock for sinister purposes, and that resuscitating the company under a new name, and setting up by them of a claim to the franklinite and iron ores on Mine Hill, was a fraud on the Zinc Company. Conceding the truth of the allegation, (of which I find no competent evidence) it will not affect the result of the inquiry. The validity of the charter cannot depend upon the motives with which it is procured, nor upon the integrity of those at whose instance it is granted. Nor can the mere continuance or resuscitation of the company under a new name operate as a fraud upon the Zinc Company. It is not the resuscitation of the charter or the continuance of the corporation that operates as a fraud

upon the rights of the Zinc Company, but the claim that is set up to the ores and mining rights claimed by them, and which were not transferred pursuant to the agreement.

The whole inquiry terminates in this—was the change in the terms of the grant made by the Sussex Zinc and Copper Mining and Manufacturing Company to the New Jersey Zinc Company, by the omission of the clause contained in the deed from Fowler, “when it exists separate from the zinc,” fraudulently made? It is clear that the omission is not in accordance with the terms of the original agreement between the parties of the fourth of September, 1851, under which the transfer was made. The complainants allege that it was done fraudulently and without the assent of the grantees. The defendants insist it was done, after full discussion, with the knowledge and consent of the directors of both companies.

Fraud is never presumed. The legal presumption is in favor of the good faith of the transaction. The conveyance was made and accepted some months after the execution of the agreement, and the presumption must be that the terms of the contract were changed after it was made and before the deed was executed. The burthen of proof is upon the party alleging the fraud. The mere variation between the terms of the agreement and the deed is not sufficient.

The complainants prove, by C. E. Detmold, that the agreement between the companies was carried out in substance; that the Zinc Company recognised it as binding, and carried it out in good faith. This witness was president of the company from 1853 to 1856. His first connection with the company was in November, 1852. This was after the execution of the deed to the Zinc Company. He has no knowledge of the circumstances which attended the execution of the deed, or of the negotiations which led to it.

Richard Jones was a director of the New Jersey Ex-
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ploring and Mining Company in 1851. He testifies that he was present at the meeting of the directors of the two companies when the agreement of the fourth of September, to amalgamate the two companies, was made; and neither at that time, nor at any subsequent time, heard any discussion as to changing the phraseology of the deed to be given to the New Jersey Exploring and Mining Company from that contained in the deed from Fowler to the Sussex Zinc and Copper Mining and Manufacturing Company. He ceased to be a director of the Zinc Company in May, 1852; thinks he was not a director when that company accepted the deed from the Sussex Company, and ordered it to be recorded, and does not know when that was done. The deed, though dated in March, 1852, was neither acknowledged nor recorded till April, 1853. All this evidence is merely negative. It does not prove the fraud, nor disprove the allegation of the defendants, that the deed was accepted with the altered phraseology in execution of the agreement.

The defendants have called four witnesses, Alexander C. Farrington, Samuel Fowler, James L. Curtis, and Silas M. Stilwell, who testify substantially, that after the deed had been prepared, a meeting of the directors of each company was called, the phraseology of the deed in the description of the premises, which corresponded with the description in the deed from Fowler, was objected to, the subject was discussed between the directors of the two companies, a new deed was ordered to be drawn, the deed, as amended, was read to the board of directors of the New Jersey Zinc Company, the alteration in its phraseology made the subject of discussion, and was accepted by the directors with knowledge of the change, and of the reasons for making it. Three of these witnesses, Farrington, Fowler, and Curtis, were directors of both companies, and all participated in the discussions at the boards touching the change in the phraseology of the deed. Stilwell was a director of the Zinc Company, was

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present when the language of the deed was the subject of discussion between the directors of the two companies; the deed, as amended, was read over by him to the directors of the Zinc Company, and he was present when it was accepted.

The witnesses are certainly intelligent, and had opportunities of knowing the facts. All the exceptions which have been taken to the credibility of their evidence is not sufficient to shake or materially to impair the force of their united testimony. It cannot be denied that there are circumstances connected with this transaction which excite distrust, and which, if clearly established, might, upon a proper case, have entitled the stockholders of the Zinc Company to relief as against the act of their own officers. It is shown that the deed was executed to the Zinc Company for the purpose of carrying the agreement between the two companies into effect, which it clearly does not do, inasmuch as it does not convey all the property to which the Sussex Company were entitled under their deed from Fowler. No evidence of the alleged agreement to change the terms of the conveyance is found upon the minutes of either company; and evidence is offered, on the part of the Zinc Company, tending to show that the individual interests of the directors were, or might have been, hostile to the interests of the other stockholders, and that the change in the terms of the conveyance were in a high degree prejudicial to the interests of the Zinc Company. Let all this be conceded, the facts are nevertheless established by the evidence, that the deed, as executed, was accepted by the Zinc Company, upon deliberation, as a performance of the agreement on the part of the grantors. The alleged reasons for the acceptance of the title, *viz.* that the deed, as executed, conveyed all the title that Fowler intended to convey, or all that the grantees took or claimed under the conveyance, or that its terms were contradictory and absurd, may or may not have been justified by the facts of the case. But

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they suffice to show that the change of terms was not necessarily fraudulent, and may have been made with an honest purpose. And not only was the title accepted by the Zinc Company, but they recognised its validity, and continued to claim title under it, recognising the adverse rights of the Franklinite Company down to the time of the commencement of this suit.

The charge of fraud in the alteration of the deed is not sustained upon the pleadings and evidence in the cause. There is no ground upon which the conveyance in question can be set aside as fraudulent or reformed on the ground of mistake—neither the frame nor the prayer of the bill is adapted to such relief.

This conclusion renders it unnecessary to consider another ground, urged by the defendants' counsel upon the argument, *viz.* that the Boston Franklinite Company is a purchaser, for a valuable consideration without notice, of all the rights of the New Jersey Franklinite Company, and cannot be affected by a secret equity in favor of the complainants as against the latter company.

The Boston Franklinite Company have acquired all the rights of the New Jersey Franklinite Company to the premises in question; their title rests upon the legal effect and operation of the deed of the eighth of March, eighteen hundred and fifty-two, from the Sussex Company to the New Jersey Zinc Company. It is not limited to the franklinite and iron ores, when they exist separate and apart from the zinc, but includes all the franklinite and iron ores embraced within the terms and legal effect of the exception in the deed.

II. Is the ore in question a zinc ore, which passed by the terms of the grant to the Zinc Company, or is it a franklinite or iron ore within the exception in the deed, which was reserved to the Franklinite Company? The terms of the grant, it will be remembered, are "all the zinc and other ores, except franklinite and iron ores." The incontrovertible fact is, that the mass consists of zinc

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ore and franklinite in such close mechanical combination that neither can be taken from the mine without removing the other. Which party, by the terms of the deed, has title? Each party claims the entire mass—one or the other must take it.

Each party has a freehold estate in the thing granted. There may be within the same territorial limits distinct estates of inheritance. The different stories of the same dwelling may be held in fee by different owners. The title to the surface of the soil may be in one person, the title to the mines, or different strata under the surface, may be in others. Neither of these parties own the surface of the soil beneath which the ores are found. The title to the surface is in Fowler, to the zinc in the complainants, to the franklinite in the defendants. The deeds are in the ordinary form of a conveyance of real estate, and purport to convey a title to land. They are not grants of hand specimens or isolated minerals, but of masses of ore in *situ*.

The value of the minerals granted consists in their adaptation for the furnace and the production of metals in bulk. The terms "zinc ores," "franklinite and iron ores," are used as a description of the land granted and reserved. Whether the subject of the grant be designated by metes and bounds, or by name, or by description of its character, is immaterial. A deed for all the cedar swamp on Pole branch, in the township of A., would be as effectual to convey the land as though it were described by metes and bounds or by its name of Whiteacre; and the grantee would take not the cedar trees growing upon the tract, but the entire tract falling within the description, though trees of other varieties might be found within its limits. A deed for a mine with mining privileges is not a mere license to take away ore, or the grant of an easement or other incorporeal hereditament, but of a part of the freehold. *Caldwell v. Fulton*, 31 Penn. St. R. 475; *Grubb v. Bayard*, 2 Wallace, jr. 81.

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The grantee takes not an incorporeal hereditament, but an estate in the land itself, for which an ejectment will lie. *Comyn v. Kynto*, Cro. Jac. 150; *Whittingham v. Andrews*, Salk. 255; *Adams on Eject.* 20; *Turner v. Reynolds*, 11 Harris 199. And which is subject to dower. *Stoughton v. Leigh*, 1 Taunt. 402; *Park on Dower* 116, 120; 1 *Crabb on Real Estate* 98; 1 *Washburne on Real Prop.* 166.

The deeds must be construed as any other deeds for land, subject to the qualification necessarily imposed by the limited character of the thing granted and a due regard for the rights of others having interests in the same land. Thus, though the grant include all the ores, sufficient support must be left for the surface, the title to which is in another party. The owner of the lower story of a dwelling cannot deprive the upper stories, which are owned by others, of their support. *Harris v. Ryding*, 5 Mees & W. 60; *Humphries v. Brogden*, 12 Queens B. 739; *Jeffries v. Williams*, 5 Excheq. 792; *Smart v. Norton*, 5 Ellis & B. 30.

In construing the deeds, reference must be had, in order to ascertain the intention of the parties, to the existing state of knowledge of the subject matter, the received meaning of the terms employed, and the usages prevailing at the date of the conveyance, rather than to the time of the alleged injury. Thus, when doubts arise in regard to the true meaning or application of a term used in the deed, the meaning of which may have changed, in order to ascertain the true import of the term used by the parties, and the application of it to the proper subject matter, recourse must be had to its popular signification at the date of the deed. So where the construction or effect of the deed depends upon local usage, it must be referred to the usage existing at the date of the deed. *Harris v. Ryding*, 5 Mees & W. 69, per Parke, B.; *Smart v. Morton*, 5 Queens B. 30.

If this view of the nature of the title of the respective parties be correct, it follows that the controversy does not

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regard the ownership of the ores merely when mined or detached from the soil, but involves the title to the freehold or inheritance. It is upon this ground that the injunction is allowed. 1 *Story's Eq. Jur.* § 929; *Thomas v. Oakley*, 18 *Vesey* 184; *Livingston v. Livingston*, 6 *Johns. C. R.* 497; *Merced Mining Co. v. Fremont*, 7 *Cal.* 318.

The ownership of the property is in no sense joint. It is not in the same, but in distinct things. No partition of their interest could be made. Each claims title to the whole mass of the ore in the same vein or stratum. One or the other must be entitled to it. The deeds were not intended to convey, and do not convey, distinct interests in the same lode, vein, or stratum. Some test must be applied by which the title to each vein, or distinct portion of a vein, can be ascertained to belong to one or the other of the parties.

It is satisfactorily shown by the evidence that, at the dates of the deeds in which this controversy has its origin, and as late as the year 1853, the masses or veins of ore upon Mine Hill were regarded and known as franklinite. The ore was so called by the proprietors of the mines and by the miners themselves. It was so described in scientific treatises and in geological reports. It was so classified and arranged in mineralogical cabinets and exhibitions. The mass was known not to consist entirely of that mineral. Pure specimens or crystals of franklinite were known to exist only in small and unimportant bodies, having no value for practical purposes. In the general mass of the ore, there was mingled with the franklinite, ores of zinc and other minerals in various proportions. But so far as was known, franklinite constituted the predominating element which gave character and title to the mass. Zinc ore had been discovered and used in at least one locality, but no well defined vein of zinc ore had been developed. Upon Stirling Hill, in the immediate vicinity, distinct, well defined veins of zinc and franklinite had been developed, and the zinc vein extensively worked. Here, as

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on Mine Hill, the ores were found to some extent in mechanical combination. Both veins contained more or less of each mineral. In the zinc vein the red oxide of zinc predominated; it formed the enveloping mass which gave name and character to the ore, and though grains of franklinite were found extensively disseminated throughout the mass, it was universally known and designated as zinc ore. On Stirling Hill, the separate lodes, though in immediate contact, were generally well defined and distinguished by clear lines of demarcation. From the general geological character of the vicinity, it was anticipated that, in the progress of investigation, a similar distinct and well defined vein of zinc ore would be developed upon Mine Hill. Upon this state of facts within the knowledge of the parties, there seems to be no room for rational doubt as to what the parties intended by the terms used in the deed as descriptive of the subject matter of the conveyance. By "zinc ores" was meant those veins or lodes in which the ore of zinc was the predominating ore, and by "franklinite," not the pure mineral of that name, which was never found except in small and detached specimens, but those veins or lodes in which franklinite predominated, and which was known and designated as franklinite ore. The instrument must be construed according to the mind and intent of the parties at the time it was executed. It is no valid objection to this construction that franklinite is a mineral, and not a metal, and that, speaking with scientific precision, there is no such thing as a franklinite ore, in the sense in which we speak of a zinc or iron ore. The question is not, what is the scientific import of the terms, but in what sense the parties to the contract understood and used them. The evidence abundantly shows that the term franklinite was in constant and familiar use to designate the ore or mass in which that mineral predominated.

The same view of the import of the terms seems to have prevailed in the minds of the parties down to the time of

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the commencement of this suit. The complainants, in their original bill, claim that the defendants own none of the ores except the franklinite when it exists separate from the zinc, and allege that the defendants were mining and using the ore in controversy under the pretence that the opening, or mine, contains nothing, or nearly nothing, but franklinite, whereas the complainants allege that zinc is the predominating ore in said opening, or at least constitutes a very large proportion of the ore therein. The Franklinite Company, in their answer, allege that in the veins yet discovered on Mine Hill franklinite is the predominating metal; that the ore in excess gives name and character to the vein. And they further allege, that in the working of the ore taken by them from the new opening not more than fifteen per cent. of zinc has been extracted.

The evidence shows that the vein or lode in which the mine called the new opening is situated, at the date of the deeds and down to the commencement of this controversy, was known and designated as a franklinite vein, and that in the great mass of mineral substances in the vein, as far as developed, franklinite predominates. The evidence further shows that, taking the entire aggregate of the ores which have been taken from the mine by both companies, there has been a very decided excess of franklinite over the zinc ore in the mass.

The complainants insist, nevertheless, that the title to the mine is in them, because the entire mass of ore there, including as well the franklinite as the zinc, existing as it does in intimate mechanical combination, constitutes zinc ore within the letter of the grant. Upon this and kindred points involved in the inquiry, a great amount of valuable testimony has been given by witnesses distinguished for their scientific attainments and practical skill as mineralogists. The court acknowledges its obligation for the light thus afforded, which has served to render some of the points of inquiry entirely clear. The evi-

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dence, indeed, has satisfactorily settled most of the incidental questions of fact which have arisen in the cause; and although there are conflicts in the testimony upon matters of opinion, and still more upon matters of inference, yet, upon a careful review of the evidence, and an examination of the very elaborate arguments of counsel, I do not find any essential difference in the result of the various analyses nor upon the material questions of fact bearing upon the result of the controversy. I shall therefore content myself by stating, in the progress of the opinion, what I understand to be the clear result of the testimony, without referring to it in detail or naming the witnesses, and without adverting to occasional conflicts which do not affect the general result.

I think the evidence does show, as claimed by the complainants, that the bulk of the ore in question (I refer more especially to what is called by the witnesses the gray ore) is properly called zinc ore. It is, in other words, a mineral body containing so much of the metal of zinc as to be worth smelting. It is shown that it has been profitably worked for the zinc which is extracted from it, and hence, in popular understanding, as well as in strict technical meaning, it would be called an ore of zinc. And if the deed to the Zinc Company contained a simple grant of all the zinc ore, without exception, found or to be found in the tract, the argument in favor of their title to the entire mass would certainly be very strong, not only because the ore would fall directly within the description of the grant, but because, in case of any doubt, the grant must be taken most strongly against the grantor. But the grant is of all the zinc and other ores, except franklinite and iron ores. The franklinite is expressly excepted from the grant, and to adopt the construction contended for would be to nullify the exception, or to restore the clause contained in the deed from Fowler to the Sussex Company, "except the franklinite or iron ores, when it exists separate from the zinc." Either construction is inadmis-

sible, because it would be in conflict with the terms of the grant. If the grant had been of all the zinc ore except the red oxide of zinc, the red oxide of zinc would not have passed by the grant simply because it is expressly excepted. It would add no strength to the claim of the grantee to demonstrate that the mass in which the red oxide was found constitutes a good zinc ore, because the grantors could never have intended, by the term zinc ore, to have included the red oxide, which by the express terms of the grant is excepted.

It is further insisted, on the part of the Zinc Company, that whether a particular ore shall be called zinc ore on the one hand, or franklinite or iron ore on the other, does not depend upon the preponderance of zinc or oxide of zinc upon one hand, or of franklinite or oxide of iron upon the other, but on the relative value of the respective products, after taking into account the expense of extracting the same.

It was suggested, upon the argument, that this ground of defence was inadmissible, as it was an entire departure from the ground of claim set up by the Zinc Company in the original bill, and upon which an issue was made by the answer to that bill. But a bill in the nature of a supplemental bill is not an addition to the original bill, but another original bill, to which a new defence may be made. *Story's Eq. Pl.* § 353; *Mitford's Pl.* 72; 3 *Daniels' Chan. Pr.* 1686.

The complainant in the original bill, in his answer to the supplemental bill, is not controlled by the averments of the bill, nor limited to the same grounds in support of his title.

The evidence offered upon this point suffices to show that, either in scientific or metallurgical nomenclature, an ore containing different metals may be, and ordinarily is termed an ore of that metal for which it is only or primarily worked; and that the ore in question, being more valuable as a zinc than as an iron ore, and being worked

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for its zinc, is properly a zinc ore. I do not understand it to be insisted, and it certainly is not established by the evidence, that an ore is properly called an ore of the metal *only* for which it may be most profitably worked, or that there is any inflexible rule adopting the value of the product as a test of the name of the ore. The extent of the evidence, I think, is that the ore would more usually and more properly be styled an ore of that metal for which it is primarily and most profitably worked. Assuming it to be satisfactorily established that this ore may be most profitably worked for its zinc, and that it may, by that principle of classification, be termed a zinc ore, the important question still remains, was that the mode of classification adopted by the parties to the deed in question? Did they so understand it? Was that the meaning they attached to it? Upon this point, as has been already said, the evidence is decisive. No such mode of classification, as the relative value of the respective metals was (so far as appears by the evidence) ever adopted by or known to the parties at the date of the deed, but on the contrary, the ore was known and designated by the preponderance of the metal contained in the vein, without regard to its value; and that by those who owned it, who dealt in it, who used it, and who classified it, the ore of the vein in question was known and designated as franklinite. It is immaterial, therefore, by what other or different name the ore may be called. It is obvious, moreover, that the system of classification of ores, by the relative value of the metals contained in them, however proper it may be in the nomenclature of mineralogists or metallurgists, can never be adopted to settle the construction of a deed or the title to the ore. The name would be liable to constant fluctuation, depending upon the fluctuation in the market price of the respective metals, the locality in which the ore is found, and the facilities for working it. It would convert the franklinite itself into an ore of zinc. The title to the ore certainly could not

fluctuate with the change of name—that was fixed by the delivery of the deed.

Another ground relied upon by the Zinc Company is, that the vein of ore in which the new opening is made is found, upon careful examination, to consist of two distinct layers or strata. That one of these strata contains so large an admixture of zinc ore in some of its shapes, either as red oxide, silicate, or carbonate of zinc, as to constitute the preponderance of the mass, and to form with the franklinite a good zinc ore. This claim applies to what is usually termed the gray ore, as distinguished from the black ore taken from the new opening, and is the ore which has mainly been mined and taken away by the Zinc Company.

It is admitted that this ore is taken from a part of the great west vein, which is known as franklinite, and in the aggregate ore of which, including as well the black as the gray ore, the franklinite greatly predominates. It is claimed that the gray ore, containing a large admixture of the red oxide of zinc, constitutes a distinct and clearly defined stratum or layer in that vein to which the Zinc Company have title. The existence of this distinct layer or stratum is denied. It is admitted that certain portions of the vein contain more zinc than others, and that the ores vary in color; but it is insisted by the Franklinite Company that these portions are not found in distinct layers or strata, or in segregated masses or deposits, but are scattered irregularly and indiscriminately through the vein. Upon this point there is much conflict in the evidence. The fact of the existence of such distinct stratum is not established. The burthen of proof upon this point is upon the Zinc Company. The ore is taken from part of a franklinite vein, and from a mine in which the great mass of the ore is franklinite. If this particular portion of the vein belongs to the Zinc Company, the existence of the stratum or deposit to which they claim title should be clearly shown.

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But admitting the existence of a distinct and well defined stratum within the mine in which the ore in question is found, the evidence does not show an excess of zinc over the franklinite. On the contrary, the average of the analyses show a clear preponderance of franklinite over the zinc in the mass of the ore in question.

The Zinc Company have not shown a title to the mine called the new opening, nor a right to the ores taken therefrom, either by themselves or by the Franklinite Company. The injunction against the Franklinite Company must be dissolved, and the bill dismissed with costs.

In the case of the Boston Franklinite Company against the Zinc Company, a reference will be ordered to take an account, and the injunction against the Zinc Company continued till the final hearing. This direction is given upon the assumption that the dismissal of the original bill does not finally dispose of the case upon the bill in the nature of a supplemental bill. Such appears to be the rule. No allusion was made to the point upon the argument, and counsel will be heard upon it, if desired, before the signing of the decree.

I have entertained strong doubts touching the propriety of holding either of these injunctions, and it is with hesitation that the cases are now decided upon their merits. The controversy involves a question of title to real estate. A court of equity will rarely interpose by injunction to restrain the working of mines until the right is established at law. *Eden on Injunc.* 112, (*Waterman's ed.*) 194.

And where an injunction is granted, the course most consistent with the practice and inclination of the court is to have the right tried at law. *Grey v. Duke of Northumberland*, 17 *Vesey* 281.

But the case has been peculiarly situated. The injunction in favor of the Zinc Company against the Franklinite Company, who were originally in possession, has been of long standing. No motion has been made to dissolve it, nor has either party asked a trial of the title at law or

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tioned the propriety of the injunctions upon this
 id. Both parties have sought a decision, by this
 of the question upon the merits. Evidence has
 taken affecting the entire question at issue, and the
 argued exclusively upon the question of title. The
 was heard with the understanding that a decision
 e question of right was desired, to the end that the
 tant questions involved should be speedily and finally
 ed by the court in the last resort. Under these cir-
 cumstances the question is decided, aside from all questions
 echnical character, exclusively upon its merits, be-
 g that the ends of justice will thereby be most
 ually promoted.

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lize the taking of seven per cent. interest on contracts by virtue of
 pplements to the act concerning usury, the contract must be ac-
 r made within one of the districts specified in the act.

itehead, for complainant.

liamson, for defendant.

3 CHANCELLOR. The bill is filed to foreclose a mort-
 given, on the 25th of February, 1856, by William
 veans and Samuel Giveans to William McMurtry to
 the payment of \$3000, with interest at the rate of
 per cent. per annum. The answer of William D.
 ns, the principal debtor, (the other obligor having
 in the bond and mortgage as a surety) sets up
 as a defence.

question at issue involves the true construction of
 pplement to the act against usury, approved March
 54, *Nix. Dig.* 373, § 8, and of the further supple-

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ment to the said act, approved April 6th, 1855, *Nix. Dig.* 374, § 10, *Pamph. Laws* 752.

The act of March 2d, 1854, authorizes interest to be taken at the rate of seven per cent. upon all contracts thereafter made in either of the counties of Hudson or of Essex, or in the city of Paterson; *provided*, that *each one* of the parties to such contract shall, at the making thereof, reside either within the limits of said counties or city or out of the state.

The act of 1855, after reciting that doubts had arisen in relation to the proper construction of the act of 1854, declares that the said act shall be taken and construed to legalize *all contracts made* since the said act went into operation for the loan or forbearance of money upon interest at the rate of seven per cent.; *provided* the contracting parties, or *either* of them, *was* or *shall* be at the time of making the contract resident of or located in either the counties of Hudson or Essex or the city of Paterson or out of this state.

The design of the last statute, as appears by the preamble, was to remove doubts which had arisen in relation to the proper construction of the former act. What those doubts were is not expressly stated; but from the enactment of the statute, as well as from its preamble, the obvious presumption is that the doubts existed in relation to the proviso of the statute, which requires *each one* of the contracting parties to reside within the districts specified or out of the state, and that the design of the statute was simply to remove those doubts by altering the language of the proviso and rendering it less ambiguous.

Limited to this object, the simple effect of the act of 1855 was to legalize all contracts made or to be made within the districts specified, provided that both or either of the contracting parties resided within either of those districts or out of the state. But the language of the act is much more comprehensive. It contains no reference whatever to the place of making the contracts. In terms,

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therefore, the act not only comprehends all contracts made within the counties of Hudson or Essex or within the city of Paterson, but *all contracts wherever made*, provided both or either of the contracting parties resided within the limits specified or out of the state. And such it is insisted must be the construction of the statute.

The effect of this construction would be to strike from the act of 1854 the entire clause in relation to the place of the contract, and confine its operation to the *residence* of the contracting parties. It would legalize contracts for interest at seven per cent. in every part of the state, provided either of the contracting parties lived out of the state or within certain specified limits within the state. This would, indeed, place the law regulating the rate of interest upon a most unsatisfactory basis. The right to charge seven per cent. interest would not be confined to any locality. It would not be regulated by the place of the contract, but solely by the residence of the contracting parties. Such result never could have been within the contemplation of the legislature. The design of the legislature, in both acts, was to legalize contracts for interest at seven per cent. for the benefit (real or supposed) of the residents of the localities or districts specified in the act. That such was the design of the legislature is abundantly manifested by reference to contemporaneous legislation. Thus the county of Union having been set off from the county of Essex in 1857, doubts arose whether the operation of the act of 1854, which was limited in terms to the counties of Hudson and Essex, would extend to the county of Union, although that territory was included within the limits of Essex at the passage of the act. To remove those doubts, by an act approved February 18th, 1858, (*Pamph. Laws* 89) it was enacted that all contracts made in the county of Union, after the creation of that county by virtue of the act of 1854, for the loan or forbearance of money, with interest at the rate of seven per cent., should be valid and legal in the same manner and

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to the same extent as authorized by the act of 1854 in the county of Essex. This act has clear reference to the locality of the contract as well as to the residence of the contracting parties. In like manner, the act of February 6th, 1858, (*Pamph. Laws* 34), the act of March 18th, 1858, (*Pamph. Laws* 475), and the act of 1860, (*Pamph. Laws* 111), which extend the operation of the law authorizing interest to be taken at the rate of seven per cent. to the county of Bergen, to a part of the township of Woodbridge, and to the township of Acquackanonk, all require that the contract should be made within the limits of those districts respectively. In all the legislation on this subject it is apparent that the legislature designed that the place of the contract should be the test of the legality of the interest, in accordance with the familiar principle, that the validity and construction of the contract are to be determined by the *lex loci contractus*.

This interpretation of the act is in accordance not only with the design of the legislature, as manifested by contemporaneous legislation, but is sanctioned by well settled principles of construction. In the construction of statutes, reference must always be had to the subject matter of the law, *that alone* being supposed to be within the mind of the legislator. The act of 1855, as appears by its title and preamble, is explanatory of the act of 1854, and was passed for the purpose of removing doubts which had arisen in relation to the proper construction of that act. Now the design of the act of 1854 was to legalize interest at the rate of seven per cent. within certain specified limits. The subject matter of that act was contracts made within those limits only. The subject matter of the explanatory act of 1855 was identical with that of 1854, *viz.* contracts made within those limits only. When, therefore, the legislature, in the act of 1855, legalized *all* contracts bearing interest at seven per cent. made after the act of 1854, they must be understood as having in

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contemplation all contracts within the purview of that act, and made under color of its authority.

The language of the act of 1855 is prospective as well as retrospective in its operation. It is on this ground alone that the complainant can avail himself of its provisions, as his mortgage was given after the act went into operation. Its effect is to legalize not only contracts then made, but also such as should be thereafter made. It was obviously designed as a legislative construction of the provision of the act of 1854. The two statutes must be construed together. They are both supplements to the act against usury, and constitute a portion of the general law of the state upon that subject. It is of the utmost importance that their meaning should be precisely defined. The true construction and effect of the law, I think, is to authorize the taking of seven per cent. interest upon contracts made in certain specified districts of this state. One of the parties must not only live in the locality specified, but the contract must be made there. Seven per cent. interest can only be taken upon contracts made within such locality. Upon all other contracts (except by virtue of some special statute) six per cent. continues to be the legal rate of interest, and contracts upon which a high rate is reserved are usurious.

Where, then, was this contract made? The mortgagee resides in the city of Newark, the mortgagor in the county of Sussex. The negotiation for the money was carried on and completed, the bond and mortgage executed and delivered, and the money paid to the mortgagor, in the county of Sussex. As to these facts there is no dispute. Nor do I find in the testimony the least evidence of the contract being made elsewhere. The facts are very clearly stated by David Ryerson, esq., by whose agency the loan was made. The property of the mortgagors was advertised for sale under an execution. They applied to Mr. Ryerson, who was president of the Sussex Bank and the father-in-law of the complainant, for a loan of

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money. He agreed to procure the money for them, or failing in that, to see that they had the money in time to save their property from being sold. The terms of the contract, the amount of the loan, the time of payment, the security to be given, and the rate of interest were all agreed upon at Newton between Mr. Ryerson and the mortgagors. He gave the instructions to the attorney, and furnished the money for which the mortgage was given. All this must have been done by him as the agent of McMurtry.

But it is urged that the mortgagors employed Mr. Ryerson to procure the loan for them, that they paid him for that purpose, and that he, as their agent, negotiated the loan on their behalf with McMurtry. All that is said on this point by the witness is, "I procured a loan of that amount for them from William McMurtry." Where, when, or how that contract was made we are not informed. For all that appears in evidence it might have been made at Newton.

But assuming that the application for the loan and the authority to make it was given in Essex, still the contract for the loan was not made there. The utmost that can be said is, that Mr. Ryerson, in executing the contract, acted as agent of both parties. He applied to McMurtry for the loan as the agent of Giveans. He was authorized by McMurtry, as his agent, to make the loan on his behalf. But the contract for the forbearance of the money was made at Newton.

If McMurtry had gone to Newton, and there agreed that Ryerson should make the loan on his behalf, and furnished him the money to be loaned, and the parties had then gone to Newark and executed the contract there in pursuance of this authority, it would scarcely be pretended that the loan would have been usurious on the ground that it was not made in the county of Essex.

Or if, upon the evidence in the case, the rate of interest had been seven per cent. in Sussex, and only six in Essex,

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he loan, as made, would not have been deemed usurious on the ground that it was made in Essex.

I am of opinion that this contract is for a greater rate of interest than is allowed by law, and is consequently usurious and void.

I have arrived at this conclusion with some reluctance, not only from its consequences upon the creditor, but from a belief that the contract was made under a mistake of law and a misapprehension of the party's rights. But there is no pretence of ignorance or mistake of facts, and the law will infer a corrupt intent where the fact of taking more than six per cent. knowingly is proved. *Sussex Bank v. Baldwin*, 2 Harr. 496.

The bill must be dismissed.

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to constitute a mortgage, the conveyance must be *originally intended* between the parties as a security for money or as an encumbrance merely. Parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted by fraud, surprise, or mistake.

A deed made to hinder, delay, or defraud creditors is void only as to creditors: it is valid as against the grantor and his heirs.

The terms of the contract must be clearly proved before a party is entitled to a decree for its specific performance.

Joel Parker and Joseph F. Randolph, for complainants.

Cannon and Beasley, for defendants.

THE CHANCELLOR. The bill is filed by the heirs of Abraham Stillwell against the heirs of Joseph M. Stillwell, to redeem certain real estate, which was conveyed from Abraham to Joseph by an absolute deed in fee simple, bearing date on the 8th of April, 1824.

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The instrument in question is not a mortgage, nor in the nature of a mortgage. Upon its face it is an absolute deed executed by Abraham Stillwell to Joseph M. Stillwell for the consideration of \$1600 paid by the grantee to the grantor. It was not originally intended as a security for money. The only debt due from the grantor to the grantee at the time of its execution was already secured by bond and mortgage upon a part of the same premises. Those securities continued to be held by the grantee after the execution of the deed.

To constitute a mortgage, the conveyance must be originally intended between the parties as a security for money or as an encumbrance merely. 2 *Story's Eq.* 427. § 1018; 4 *Kent's Com.* 142.

Parol evidence is admissible in equity to show that it was intended as a mortgage, and that the defeasance was omitted by fraud, surprise, or mistake. 4 *Kent's Com.* 142.

But it is not pretended that the defeasance was omitted by fraud or mistake. According to the case made by the plaintiff's evidence the deed is precisely what it was intended to be, viz. a shield against the claims of creditors.

The complainant's wife and daughter, who alone testify as to the transaction, show conclusively that it was not designed as a security for a loan, but in fact to protect the property of the grantor from his creditors. If this be the true character of the transaction, it is clearly not a mortgage nor in the nature of a mortgage. A deed made to hinder, delay, or defraud creditors is void only as to creditors. It is valid as against the grantor and his heirs. Nor will a court of equity relieve against it at the instance either of the grantor or his heirs. *Den v. Monjoy*, 2 *Harv.* 174; *Jackson v. Garnsey*, 16 *Johns. R.* 192; *Roberts on Fraud*, Con. 646; *Jackson v. Dutton*, 3 *Harrington* 98.

No party to an agreement in fraud of legal rights is entitled to the aid of a court of equity. *Tantum v. Miller*, 3 *Stockt.* 551; *McClure v. Purcel*, 3 *A. K. Marsh* 61.

The case, as made by the bill, is that subsequent to the

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conveyance to Joseph M. Stillwell, a written agreement was made by the grantee to reconvey to the grantor the premises conveyed by the deed upon the repayment of the amount then ascertained to be due from the grantor to the grantee. This is clearly a totally distinct contract from any that was or could have been made at the date of the deed, for it includes, by its terms and according to the complainants' evidence, moneys which were advanced after the date of the deed.

It is this contract of which the complainants, after the lapse of thirty years, ask a specific performance.

The contract which is set out in the bill is essentially different from that established in evidence. The bill sets out a contract purporting to have been made on the 22d of October, 1827, for the reconveyance of the premises upon the repayment of \$630 with interest. The contract, which the complainants claim to have proved, was made on the 12th of August, 1825, by the terms of which the reconveyance was to be made on the repayment of \$541.30 with interest. There is no correspondence between the allegation and the proof. They differ in essentials. If the complainants' equity was clear, and this was the only difficulty in the way of a recovery, the bill might be amended upon proper terms even at this stage of the cause.

But the terms of the contract are not proved with sufficient clearness to warrant the interference of the court. No rule is better settled than that which requires that the terms of the contract should be clearly proved before a party is entitled to a decree for its specific performance.

The contract is alleged to have been in writing. Three witnesses, who saw it, speak as to its contents. The only witness who is not a party in the cause is John D. Barkalow. He was an aged witness. He saw the paper once, and read it in the spring of 1834, twenty-two years before his examination. He describes it as having three names signed to it. Joseph M. Stillwell was one, the other two,

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he thinks, were Rebecca Stillwell and Michael Stillwell. There were three seals to the instrument, a seal opposite each name. Whether the names of Rebecca and Michael were signed as sureties, he does not know. He thinks the paper specified five hundred and some few dollars, but he is not positive as to the amount. The other witnesses who speak as to the contents of the writing are Phebe Stillwell, the widow of the grantor and a defendant in the cause, and Sarah Lokerson, one of the complainants. Both of these witnesses had full opportunity of being well acquainted with the contents of the paper. According to their evidence, they had both had it in their keeping, had frequently read it, and spoken of its contents. The paper passed from their possession in June, 1835, after which neither of them saw it. The bill in this cause was exhibited in June, 1855. It was an injunction bill, and was sworn to on the 12th of June by the complainants, including Mrs. Lokerson and Ralph Hulse, who had also seen the original contract. The bill was not only sworn to but must have been prepared upon information furnished by Mrs. Lokerson and Mrs. Stillwell, for no other living persons possessed a knowledge of the facts. Hulse, in his testimony, is silent as to the terms of the contract. The bill, as we have seen, states the contract to have been dated on the 22d of October, 1827, and to be an engagement to reconvey upon the repayment of \$630 with interest. Mrs. Phebe Stillwell filed her answer, sworn to on the 17th of August, 1855, in which she distinctly alleges the agreement to have been as set out in the bill. It is but justice to these witnesses to believe that they remembered the terms of the contract to be as stated by them under oath in the bill and answer. On her examination as a witness, in November, 1855, Mrs. Stillwell assigns a different date to the contract from that stated in her answer, but is unable to say whether the contract was for the reconveyance of the premises upon the repayment of six hundred and odd dollars, or five

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hundred and odd dollars, with interest. She also describes the contract (as did Barkalow) as having three names consecutively, one under the other, with a seal attached to each name.

Sarah Lokerson, the only remaining witness who speaks of the contents of the paper, and the only witness who details its contents with any apparent certainty, was examined in February, 1858. With seeming confidence, she states that the contract was dated on the 12th of August, 1825, and that the reconveyance was to be made

Joseph M. Stillwell upon the payment of \$541.30 with interest. She gives no satisfactory account for her change of memory after the time of filing the bill. The remarkable change of memory in both these witnesses is satisfactorily explained by the documentary evidence on the part of the defendants. After the answer of Phebe Stillwell had been filed, the defendants filed their answer denying the alleged agreement to reconvey, as charged in the bill; and in disproof thereof alleging, that in addition to the bond and mortgage for \$409.27, held by Joseph M. Stillwell against his brother Abraham at the date of the deed, on the 8th of April, 1824, Abraham became further indebted by a sealed bill, dated on the 12th of August, 1825, for \$541.30, which remained in the hands of Joseph M. Stillwell at his death, and which still remains unpaid in the hands of his executors. It is evident that this documentary evidence, which is made an exhibit in the cause, was fatal to the complainants' case as made by the bill. With remarkable facility, the memory of each of the witnesses adapts itself to this new phase of the case. It is assumed that this was not an additional debt to that contained in the mortgage, but that in fact this sealed bill must have been given for the amount found due on the settlement. The date of the settlement is at once changed in the memory of the witnesses from the 2d of October, 1827, to the 12th of August, 1825, and the balance of indebtedness from \$630 to \$541.30.

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Without adverting to other serious objections to the reliability of this evidence, and without imputing any intentional misrepresentation or want of veracity to either of these witnesses, it is enough to say that no decree ought to be made affecting the rights of parties litigant upon evidence upon which so little reliance can safely be placed. The terms of the contract are not proved with sufficient certainty to warrant a decree for a reconveyance.

There are other obstacles of a technical character in the way of the complainants' right to relief to which it is unnecessary to advert. Enough has been said to dispose of the cause.

A great mass of evidence has, however, been taken relating to the question at issue between the parties. It is a family dispute, in which the memory of the dead and the feelings of the living, as well as a question of property, are involved. On these accounts I felt it my duty to examine the evidence in relation to the merits of the cause with more than ordinary care. It may not be improper, for the satisfaction of the parties, to state the result of that examination, as it bears upon the equity of the complainants' claim, aside from all questions of a technical character.

Abraham Stillwell, the ancestor of the complainants, and Joseph M. Stillwell, the ancestor of the defendants, were brothers. In the year 1815 a partition was made of the real estate of their father between his four sons, and the land in question, consisting of about one hundred and nine acres, was assigned to Abraham. On the 30th of August, 1815, he gave to his brother Joseph a bond for \$409.27, secured by a mortgage of even date upon fifty acres of the tract. On the 8th of April, 1824, Abraham, for the consideration of \$1600, expressed in the deed, conveyed all his land (109 acres) to his brother Joseph in fee. On the 14th of June following Abraham was discharged as an insolvent debtor. On the 12th of August,

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1825, he gave to his brother Joseph his sealed bill for \$541.80. So far the facts are matters of record, or are vouched for by written documents, and admit of no dispute. From this point the controversy arises. I shall assume the material facts to be substantially as claimed by the complainants. In or about the year 1825, Joseph gave to his brother an agreement to reconvey the land so conveyed to him whenever the debt due should be paid. In December, 1830, Abraham was again discharged as an insolvent debtor. On the 13th of January, 1831, he died intestate, leaving a widow and ten children, the youngest an infant of tender age, the eldest barely twenty-one years of age. They were left in indigent circumstances, having no means of support except the land upon which they lived. The land was encumbered with the debt due to Joseph. The title was in him, subject to the widow's dower. In this state of things the family were permitted to remain in the quiet occupancy of the premises until 1835. The mortgage to Joseph had then been outstanding for twenty years. Ten years had elapsed since he took the legal title, and agreed to permit the mortgagor to redeem. The mortgagor had died, leaving a large and dependent family. The debt had increased, according to the charge of the complainants' bill, from about \$400 to \$800. The creditor was clearly entitled to have the land or his money. If the heirs of his brother were entitled to redeem he was entitled to foreclose. Foreclosure and redemption are correlative terms.

Had Joseph M. Stillwell commenced proceedings to foreclose the right to redeem, or taken any other step to perfect his title, the rights of the heirs must have been sacrificed. Under these circumstances, he made a deed to the widow, on the 15th of June, 1835, conveying to her in fee simple sixty-six acres, more than half the tract in quantity, though less in value. The balance of the land he conveyed to his brother Jeremiah, who owned the adjoining farm, for \$800, the precise amount for which

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he held a claim against the estate. Holding the legal title, he sold so much of the land as sufficed to pay his own claim, and conveyed the balance in fee to the widow, thus securing a home to herself and her children, which they have since enjoyed unmolested. If this course was not strictly legal, it surely was not inequitable nor prejudicial to the interests of the heirs of Daniel Stillwell.

At the time of this arrangement the agreement of Joseph M. Stillwell to permit the heirs to redeem was given up by the widow. She now alleges, indeed, that it was given up from fear and the threats of Joseph M. Stillwell. But the whole circumstances repel the idea that it was obtained upon compulsion. The application was made to her in her own house, where she was accompanied by her friends. She went to the house of her daughter, with whom she had left the paper, procured it, and as the evidence shows, voluntarily delivered it to Mr. Stillwell. Three of Abraham's children were then of age, a son and two married daughters. The family were permitted to remain on the premises till the spring of 1836, when they voluntarily removed; one of the sons-in-law taking down and removing a small house which he had erected upon that part of the premises conveyed to Jeremiah Stillwell. The arrangement appears to have been acquiesced in for a period of twenty years, until the filing of the bill in this cause, and until the parties to the transaction and most of the witnesses are dead. The difficulty at this remote period has probably been occasioned by the increased value of the property. There is nothing in the case, as stated by the complainants themselves, that entitles them to relief in a court of equity.

I am nevertheless satisfied that the bill was filed by the heirs of Abraham Stillwell in good faith and with an honest conviction that they had a claim against the estate of their uncle which they were entitled to have enforced. The course adopted by Joseph M. Stillwell may have furnished some ground for this opinion.

The bill will therefore be dismissed without costs.

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tion suits the costs of the proceeding, as well as the partition itself, charged upon the several shares in proportion to their respective
 fees do not properly constitute a part of the costs and expenses to
 charged against the owners of the several shares.
 it will allow to the commissioners such sum beyond the usual fees
 by the statute as may be proper.
 rt of the commissioners designating the boundaries of the several
 with the map, constitutes the usual return; but the cost of making
 book will be allowed.
 e for drawing the return is proper.
 : of a copy of the return for record in the county clerk's office
 ed in this case.
 may be subdivided on partition, and the costs thereof will be
 ed on that share.

herford, for complainant.

riskie, for defendant.

CHANCELLOR. All the questions raised upon the
 g relate to the costs and expenses of the proceed-

ly whom are the costs and expenses to be borne?
 general rule of the Court of Chancery in England
 understood to be that declared by the Chancellor in
 v. *Fairfax*, 17 *Vesey* 558, viz. that as the party came
 equity, instead of going to law for his own conve-
 , the rule of law should be adopted, and therefore
 ts should be given until the commission; that the
 f issuing, executing, and confirming the partition
 be borne by the parties in proportion to the value
 ir respective interests, and that there should be no
 f the subsequent proceedings. *Allnat on Partition* 116;
Jels' Ch. Prac. 1387; 1 *Smith's Chan. Prac.* 481.
 s practice of denying the complainant the costs of
 l for partition in equity has been adopted in anal-

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ogy to the practice at law. No damages are recoverable in the writ of partition, and consequently no costs are given by the statute of Gloucester. Nor do any of the English statutes which authorize partition, where it could not be had at common law, give costs. Therefore the party who procures the partition is at the whole expense. *Alnat on Partition* 75.

Our statutes have entirely changed the law upon this subject. It appears by the preamble of the act of 1789, (*Paterson* 89) that the fact that the plaintiff was obliged to pay the whole costs and charges upon writs of partition was one of the evils which that statute was designed to remedy. The whole expense of the partition is, by the eleventh section of that act, directed to be divided among the shares, and to be paid by the persons to whom the shares are allotted. The act of 1797, which regulates the proceedings on writs of partition, provides that in all suits of partition instituted by virtue of that act wherein the demandant shall recover, the costs shall be divided and apportioned by the court among the demandant, defendant, tenant, and others concerned, according to their respective parts and purparts of the land. *Paterson* 251. § 8; *Nix. Dig.* 582, § 47.

Equity follows the practice at law, and charges the costs of the proceeding as well as the expenses of the partition upon the several shares in proportion to their respective values. This is the well settled rule of the court, and is in conformity with the practice in New York. *Phelps v. Green*, 3 *Johns. Ch. R.* 306; *Tibbits v. Tibbits*, 1 *Paige* 204.

The rule is moreover an equitable one. If the title is clear, partition is a matter of right. *Parker v. Gerard*, *Ambler* 236; *Baring v. Nash*, 1 *Vesey & B.* 553; *Wisely v. Findlay*, 3 *Rand.* 361.

If a party is deprived of his right by reason of the unwillingness or inability of his cotenants to make partition, and coming into a court of equity succeeds in establishing and enforcing his right, he is entitled to have

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the costs of establishing his right to the partition, as well as the expense of making it, borne by the several owners, in proportion to their respective interests in the land.

2. Do counsel fees constitute properly a part of the costs and expenses which may be charged against the owners of the several shares?

There seems to be no clear principle upon which the allowance can be justified. Counsel fees constitute no part of the legal costs of a suit in chancery. There is no statutory warrant for the allowance. There is and can be no standard by which the allowance can be regulated. The clause in the 24th section of the act relative to partition (*Nix. Dig.* 577) authorizing such further reasonable allowance as the court may judge proper refers to an allowance to the commissioners only. The provision moreover relates to proceedings under the statute. By the New York practice, the allowance appears to be limited to the costs "taxed as between party and party." Such is the form of the decree. 3 *Hoffman's Ch. Prac.* 48; 2 *Barbour's Ch. Prac.* 738, 742.

As between counsel and client, the practice in this state has been to allow counsel fees. The Supreme Court, at September term, 1830, in the matter of the partition of the real estate of Rogers and Warrington, decided that a counsel fee of ten dollars, and no more, should be allowed in proceedings for partition under the statute. The claim was not resisted. All the parties were in fact represented by the same counsel. Since then the allowance of a counsel fee in the Supreme Court has been usual.

In this court the practice has been by no means uniform. Counsel fees, varying greatly in amount, have in many instances been allowed. In many cases the allowance has not been made. I am aware of no instance in which it has been made after objection from any of the parties. The order for the allowance is frequently based on the consent of parties or on the statement that the parties concur in the allowance. Where this is the case,

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or where the proceeding is in fact amicable and in behalf of all the parties interested, the propriety of the allowance is manifest. The aid of counsel is necessary to investigate title, to examine conflicting claims, and to conduct the cause. Where the defendant concurs in the proceeding there is no reason why the complainant should be compelled to bear this part of the expense more than any other. In such case the complainant's counsel represents the interests and protects the rights of all the parties. All are presumed to be equally benefited by the proceedings. But the complainant's claim to partition may be resisted. The proceedings may be hostile, or if not hostile the defendants may employ their own counsel, and by answer seek to protect their interests. If the plaintiff's title is disputed, or the partition opposed upon any ground unsuccessfully, the defendants will be compelled to pay costs. *Hill v. Fulbrook*, Jacob's R. 574; *Morris v. Timmins*, 1 Beav. 411.

And if no opposition is made to the partition, and the defendants choose to employ their own counsel, why should they be compelled to pay the counsel of the complainant? If the complainant is entitled to an allowance for counsel fees, why not the defendants also?

As the proceeding in this case is not amicable, and as the claim for counsel fees is resisted by the defendants, it must be denied.

3. The statute fixes the *per diem* allowance to each commissioner for each day employed in the service. Though the statute in terms applies only to proceedings under the act, its directions have properly been adopted in the allowance of commissioners' fees in equity. The court is authorized, at its discretion, to make such further reasonable allowance as may be judged proper. This allowance must be proportioned to the character and extent of the services performed and the responsibility incurred. Two hundred and fifty dollars additional allowance will be made to each of the commissioners. This amount, though

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arge, is assented to by the defendants, and is not disproportioned to the magnitude of the estate, the duties performed, and the responsibility incurred in the discharge of the office. The additional sum of one hundred and fifty dollars, proposed to be allowed to one of the commissioners for extra services, in mapping, drafting, &c., is proper, and will be allowed, but it constitutes no part of his compensation as commissioner.

4. The statute (*Nix. Dig.* 574, § 7,) requires that the commissioners should return the map and *field book*, which are ordered to be recorded. The report of the commissioners designating the boundaries of the several lots, with the map, constitutes the usual return. No other field book is ordinarily filed—still a field book must be prepared, and the expenses of preparing it in a case like the present constitutes a part of the necessary expenses of the commissioners. They are, in the first place, the proper judges of the particular character of the work to be done and the proper charge for the service. If the amount charged is deemed excessive, and counsel cannot agree as to the proper allowance, it must be referred to a master to determine the amount.

5. Drawing the return of the commissioners is sometimes performed by the commissioners, or in their behalf, and included in their bill of charges and expenses. If drawn by counsel, and not charged by the commissioners, it is included in the taxed bill of costs. In either form the charge is proper.

6. Owing to the extent and value of the property and the great number of city lots included in the partition, it is a matter of public concern, as well as of private interest, that a copy of the return and map should be of record in the clerk's office of the county of Hudson. It is conceded by the parties that this is proper. An allowance will be made for the costs of such extra copy.

7. The subdivision of one of the shares by the commissioners is in accordance with the practice of the court.

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The additional costs occasioned by the subdivision must be borne by that share.

Let the final decree be prepared in accordance with these suggestions.

GEORGE M. CHAPMAN vs. ISAAC L. HUNT.

A chattel mortgage is a valid contract under the laws of this state, and the rights of the parties under it will be protected and enforced at law and in equity.

The interest of the mortgagee in personal property, where the possession remains with the mortgagor and before condition broken, cannot be taken in execution as the property of the mortgagee.

After forfeiture the mortgagee, even without foreclosure, may, upon due notice, sell and transfer the absolute right to the chattels.

Actual possession of the chattel is not essential to support his title.

Equity will not permit the mortgagor to sell the chattels to which the mortgagee has the legal title and the right of immediate possession, and to place them beyond the reach of the mortgagee and the control of the court.

Keasbey, for the motion.

Richey, contra.

THE CHANCELLOR. The bill in this case was filed to foreclose certain chattel mortgages given by the defendant, and now held and owned by the complainant. The bill prays that the property mortgaged may be sold to pay the mortgage debt; that in the mean time the defendant may be restrained by injunction from aliening, encumbering, or otherwise disposing of or interfering with it, and that a receiver may be appointed. An injunction issued pursuant to the prayer of the bill. No application has been made for the appointment of receiver. No answer has been filed to the bill, but the defendant has demurred for defects both of form and substance. A motion is now made to dissolve the injunction for want of equity in the

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ll, and because the injunction, as to the extent of its requirements, was illegally and improvidently issued.

A chattel mortgage is a valid contract under the laws of this state, and the rights of the parties under it will consequently be protected and enforced at law and in equity upon the principles, to the extent and in the mode which those tribunals respectively enforce contracts and administer relief. *Doughten v. Gray*, 2 Stockt. 323; *Unyon v. Groshon*, 1 Beasley 86; *Long Dock Co. v. Mallery*, 1 Beasley 93, 431; *Miller ads. Shreve and Pancoast* up. Court, June term, 1861, not yet reported).

In *Doughten v. Gray*, the Chancellor declares, that "in New Jersey the same doctrine prevails as to the respective rights of mortgagor and mortgagee of personal property, and as to the character of their respective interests, as governs mortgages of real property." An obvious and necessary qualification of this general doctrine will be found in the opinion of the Chief Justice in *Miller ads. Shreve et al.*, where the doctrine is thus stated. Mortgages of personal property are valid by the laws of New Jersey, and the rights of the mortgagees are similar to those of mortgagees of real estate, except in those respects in which the title to chattels and real estate differ.

Indeed, so far as I am aware, the validity of a chattel mortgage, as between the parties, mortgagor and mortgagee, has never been seriously questioned. There is no reason, indeed, why that form of contract should not be as valid and obligatory between the parties as any other which they may choose to adopt. The effect of the contract upon the rights of others and the precise rights of the parties under the contract have been and still are the subject of discussion and of some difficulty.

There is no denial in the present case of the complainant's right to foreclose the mortgage, to have the chattels sold, and the proceeds applied in satisfaction of the mortgage debt. That right was expressly adjudicated in the case of *Long Dock Co. v. Mallery*, 1 Beasley 93. But it is

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urged that the mortgagor, being in possession, has the right to sell or encumber the property; that he thereby, as in case of real estate, merely disposes of the equity of redemption, and does not affect the rights of the mortgagee. In *Doughten v. Gray*, already cited, the Chancellor said, "the mortgagor is in possession, and his title is a perfect one, subject only to the payment of the debt. He is the real and substantial owner of the property for every valuable purpose. He may sell it, subject of course to the mortgage." It will be found, nevertheless, that there is necessarily resulting from the nature of the thing mortgaged a clear distinction between the sale of a chattel and of real estate by the mortgagor, and of the right of the mortgagor to exercise the power of sale. In the case of the sale of real estate by the mortgagor nothing passes but the equity of redemption. It may be sold by execution at law and the purchaser be put in possession. The sheriff thereby incurs no liability, the rights of the mortgagee are in no wise interfered with, the purchaser takes subject to his title. But in the case of personal chattels, where delivery and possession constitute the evidence of title, the case is entirely different. In the case of *Doughten v. Gray* the property mortgaged was assigned by the mortgagor for the benefit of creditors. It was levied upon under execution against the mortgagee. The assignee sold the chattel, and converted it into money. It was held that the chattel, not the mere equity of redemption, passed by the sale, that the purchaser became the owner at law, and that the mortgagee had an equitable lien on the proceeds of the sale for the payment of the purchase money. It was further held, that the interest of the mortgagee in personal property, where the possession remains with the mortgagor, and before condition broken, cannot be taken in execution as the property of the mortgagee. In *Miller ad. Shreve and Pancoast*, the chattels mortgaged were seized in the hands of the mortgagor, upon execution at law against him, and held by

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the sheriff before the money was due upon the mortgage. The court held that the sale by the sheriff was a conversion of the property sufficient to maintain trover; that the plaintiffs at the time had title and the right of immediate possession; that the sale by the sheriff was a trespass upon the plaintiff's property, and therefore an unlawful conversion. *Brackett v. Bullard*, 12 Metc. 308.

But whatever may be the right of the mortgagor to sell the chattel prior to the forfeiture, there is no pretence of such right after the forfeiture has occurred. By the mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated the title becomes absolute at law, though equity will interfere to compel a redemption. Actual possession is not essential to support his title. Upon due notice without foreclosure he may sell and transfer the absolute right to the chattel. *Story on Bail*. 287, and cases cited, note 2; *Story's Eq. Jur.* § 1031, and cases cited, note 3; *Runyon v. Groshon*, 1 Beasley 86.

In the case before the court the mortgage was forfeited. The mortgagor had failed to pay the debt. The mortgagee was entitled, by the express terms of the mortgage, to take possession of and sell the mortgaged property, and apply the proceeds to the payment of the debt. But to bar the equity of redemption he filed his bill in this court to obtain a foreclosure and sale. While in the process of foreclosure the court will surely not permit the mortgagor to sell the property to which the mortgagee has the legal title and the right of immediate possession, and to attempt to place it beyond the reach of the mortgagee or the control of the court. The bill charges that the defendant threatens and intends to sell the mortgaged property, and I entertain no doubt of the power of the court to prevent such sale by injunction, nor of the propriety of its exercise.

It is further objected that the bill does not charge that the notes included in and intended to be secured by the

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mortgage given to Samuel I. Hunt were ever assigned to the complainant. Whether the charge in the bill is sufficient to include all the notes intended to be secured by the mortgage may, perhaps, admit of doubt. But the bill does expressly charge that Hunt, the mortgagee, did assign to the complainant the said mortgage, *and the notes therein mentioned*, with full power to collect the same. It avers, also, that these notes remain due and unpaid. Whether, therefore, the averment of transfer includes all the notes intended to be secured by the mortgage, and now claimed to be due to the complainant, is immaterial to the present inquiry.

It is further objected that the bill is multifarious; that there is a misjoinder of causes of action; that the proper parties are not all before the court. These and other objections of a like technical nature have been made the subject of demurrer, and will be considered upon the argument of the demurrer. No opinion is now intended to be expressed in regard to them. If the bill is defective in these particulars it may be amended. If there is equity in the bill, they constitute no ground for dissolving the injunction.

The injunction must nevertheless be modified. It is too broad. It not only enjoins the defendant from selling, disposing of, or carrying away any of the mortgaged property, but also from intermeddling with the property, and from confessing any judgment to prefer other creditors over the complainant. From the very nature of the property mortgaged, it consisting in part of the defendant's household furniture, stock, and farming utensils, some degree of intermeddling with the property is unavoidable. The defendant has a right to confess judgments to his creditors. If the complainant's mortgage is valid, such judgments cannot affect his rights. The injunction must be modified accordingly. The motion to dissolve is denied without costs.

Executors of Condict v. King.

THE EXECUTORS OF EDWARD W. CONDUCT vs. ESTHER A.
KING and others.

The expression in a will "dying without lawful issue," under a well settled rule of law, imported an indefinite failure of issue.

Personal property could not be limited over on so remote a contingency, and consequently under such a gift of a personal chattel the legatee took the absolute property.

But by the New Jersey statute of March 12th, 1851, the words "dying without issue" and similar expressions are made to denote a definite failure of issue, so that the will of a person dying since that act went into effect, thus limiting personal property, will pass to the legatee only a defeasible interest, which will cease upon his dying without leaving issue at his death.

Where one legacy is given as a mere substitute for another the substituted gift is subject to the incidents of the original gift, although not so expressed in the testamentary instrument.

On bills of interpleader the court disposes of the questions arising in various modes, according to the nature of the question and the manner in which it is brought before the court.

If at the hearing the question between the defendants is ripe for decision the court will decide it and pronounce a final decree.

Dalruple, for complainants.

Vanatta, Bradley, and *Williamson*, for defendants.

THE CHANCELLOR. The controversy in this case arises upon the true construction of the will of Edward Condict. By the third clause of his will, the testator having devised to his grandson, Edward W. Condict, certain real estate, directs as follows: "In the event of the death of my grandson without lawful issue, it is my will that that part of my estate herein before devised to him, and also that part of my estate to which he may be entitled as a residuary legatee, be divided between my two daughters, Phebe and Mary Ann, their heirs or assigns." By the residuary clause of his will, the testator bequeathed to his grandson "the one-tenth of the residue of his estate, to be paid to him or his guardian."

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As the law stood prior to recent statutory enactments, by the provisions of this will, the legatee took an estate tail in the land and an absolute interest in the personal property. By well settled rules of construction, "dying without lawful issue" was construed to mean an indefinite failure of issue, not a failure of issue at the death of the first taker, but at any future period, however remote. Such limitation over created an estate tail in the devisee in real estate. But because the law would not permit personal property to be entailed nor to be limited over upon so remote a contingency, under such a gift of personal chattels the legatee took an absolute property. 2 *Kent's Com.* 354; 2 *Roper on Leg.* 1522.

By the act of March 12th, 1851, (*Nix. Dig.* 877, § 27,) it was enacted that "in any devise or bequest of real or personal estate in the will of any person dying after this act shall take effect the words 'die without issue,' or 'die without lawful issue,' or 'have no issue,' or any other words which may import a want or failure of issue of any person in his lifetime, or at his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention shall otherwise appear by the will." Under the rule of construction thus established the will gave to the son of the testator an estate in fee in the land, liable to be defeated upon his death without issue, with an executory devise over in fee to the daughters of the testator.

This rule of construction, although it changed the estate in the land devised to the son of the testator from an estate tail to a defeasible estate in fee, in no wise affected the interest of the daughters in the real estate. Upon either construction, upon the death of the first devisee without lawful issue the real estate went to the daughters in fee. But its effect upon the disposition of the personal estate was to change the absolute gift of the

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property to the grandson into a gift of a qualified interest, which became absolute only upon his leaving issue at the time of his death. He held during his life only a defeasible interest in the personal property, which upon the contingency of his dying without issue vested in the daughters of the testator.

Such limitation over of an executory interest in personal estate is clearly valid. 2 *Kent's Com.* 352.

This must be the construction of the testamentary disposition under the act of 1851, unless a contrary intention appears by *the will*.

The fact that the will was executed before the act took effect cannot alter its construction. If that were to be the test, the act itself would have applied the statutory rule of construction only to wills *that were executed* after the act took effect, whereas, by its terms, it applies to all wills where the *testator dies* after the act took effect.

It does, indeed, seem to be a remarkable rule of construction that determines the meaning of the testator to be the very reverse of the legal effect of his language at the time the will was written. If the testator had died the next day or the next year after the will was made, it is clear that, by the rule of law as then settled, the grandson would have taken the personal property absolutely and the limitation over would have been void. If the testator, when he executed the will, had inquired of the scrivener or the counsel who drew it, he must have been told that the legatee took the personal property absolutely. And although there was a republication of the will by a codicil after the act went into effect, it is obvious to observe that the testator republished it according to its legal effect, as he understood it, at the time it was executed. It cannot be denied, therefore, that it is a reasonable inference not only that the testator understood the legal effect of the terms used by him, but that his intention was precisely in accordance with the legal effect of the terms

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he employed, *viz.* to give the personal estate absolutely to his grandson.

But, on the other hand, it must be borne in mind that the legislature altered the rule of construction formerly adopted by the courts upon the very ground that, as applied to the terms used in this will, it was an artificial and technical rule, which defeated the real intention of the testator. They therefore declared that in the construction of all wills in future, except where rights had already become vested by the death of the testator, a different rule of construction should prevail. Unless, therefore, a contrary intention shall otherwise appear by the will, the court is clearly bound to adopt the construction provided by the statute.

It is urged that the fact, that the testator, by the will, directed the share of the residue bequeathed to the legatee "to be paid to him or his lawfully appointed guardian," indicates an intention to give him the absolute property. But the legatee was clearly entitled to the use of the property for his life, and the executor would have been bound to pay it to him without such direction. The design of the instruction may well have been to relieve the executor from all doubts as to the propriety of placing the money in the hands of the legatee, and from all responsibility for so doing. It certainly did not change the legal effect of the will, or the rights of the legatee under it.

Again, it is urged that the provisions of the eleventh clause of the will, by which, in a certain contingency, the expenses of educating the legatee, and bringing him up "to maturity" shall be paid out of that part of the testator's estate given and devised to the legatee, indicates an intention to give him the property absolutely. It is said that this gives the legatee the use and disposal of the property for the purposes of his bringing up and education, which necessarily involves the right of absolute ownership and defeats the gift over to the testator's daughter.

The eleventh clause of the will recites that the legatee,

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he testator's grandson, since the death of his father lived with his maternal grandfather, Jason King, for which, under an agreement between Mr. King and the testator, Mr. King was to receive and had received the rents and profits of a house and garden belonging to the testator; and it is therefore directed that, should Mr. King demand anything more as a compensation for his expenses in keeping and educating his said grandson, such additional expense or compensation, together with the expense of bringing him up until he arrives at maturity, should be paid out of that part of the testator's estate given and devised to his grandson.

The effect of this clause is to diminish, on the occurring of a certain contingency, the amount of the legacy, not to alter the character of the bequest or to control the use of it in the hands of the legatee. It is tantamount to saying, if a demand is made upon me or upon my estate to pay any portion of educating or bringing up the legatee till he arrives at maturity, such sum shall be deducted out of his portion of my estate. No such demand was ever made.

The utmost effect that can be given to this clause is to diminish the amount given to the grandson and limited over to the daughters of the testator to the extent of the expenses incurred by him in his education. This will be in accordance with the intention and wish of the testator. The primary purpose of the provision clearly was to guard his estate from any claim for the maintenance or education of his grandson beyond the amount already contributed and that given in the will. He appears to have supposed that he had already contributed to that object as far as he had agreed, or could fairly be required to do, and to have expected that whatever more might be required for that purpose would be contributed by Mr. King. As the *paternal* grandfather, he was under no higher obligation to maintain the legatee than his *maternal* grandfather was. The legacies, therefore, were not

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made for the purpose of educating his grandson. At the same time there was a manifest expectation and purpose on the part of the testator that his grandson should be educated, and so far as the expense was not borne by his maternal grandfather, that it should be deducted from the property given by the will. The testator, as a man of character and property, must have contemplated that the sole representative of his only son should be educated according to his station and circumstances in life. The fund is charged not only with the compensation that should be demanded by Mr. King, but also with the expense of bringing him up until he arrives at maturity. It would be an unworthy reflection upon the memory of the testator to hold that by "bringing up" his grandson, he simply intended he should be clothed and fed. He doubtless intended that his bringing up should include an education according to his inclination and capacities and suited to his situation and circumstances in life. Nor could he have intended to limit this provision to the period of the minority of his grandson, and to have him turned upon the world at twenty-one with his education half finished and his mind immature. That is neither the necessary import nor the fair construction of the testator's language. The term "maturity" is not synonymous with legal majority. As used by the testator, it may well be held to import maturity of mind and character, the combined result of age and education. The money actually expended by Edward W. Condict in his education, either before or after he attained the age of twenty-one, should be deducted from the amount for which his estate is liable to the legatees under his grandfather's will. In regard to the amount expended by Mr. King there is more difficulty. No demand of the repayment of that money appears to have been made, either by Mr. King or by his legal representatives, after his death. Mr. King died in 1853. The legatee attained his majority on the 16th of January, 1855. His grandfather, Edward Condict, died on the first of

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December following. Upon the evidence now before the court there is no claim, legal or equitable, upon the estate of the testator for the repayment of the moneys advanced by Mr. King or his estate for the support or education of the legatee. Nor do I see any ground upon which such claim can be maintained, either against the estate of Edward Condict or his grandson, Edward W. Condict. If this money was never claimed by Mr. King or his estate from Edward W. Condict it must be presumed to have been voluntarily advanced by him for the benefit of his grandson, and there can be no equity in now charging it upon his estate for the mere purpose of diminishing the fund in his hands belonging to the legatees under the will of Edward Condict. If the existence of such claim can be established, the defendant, Miss King, will be permitted to offer evidence for that purpose; but if no such evidence exists, this part of her claim must be rejected.

One of the lots devised by the will of Edward Condict to his grandson, Edward W. Condict, was afterwards sold by the testator, and a bond and mortgage taken for the purchase money. By the third codicil to his will, bearing date in 1854, this bond and mortgage were specifically bequeathed to the devisee in lieu of the land so sold without any limitation over to the testator's daughters. The bond and mortgage are given as a mere substitution for the land. The fact that there was an ademption of the gift by a sale of the land before the date of the codicil does not change the substance of the thing. He gave the bond and mortgage as a substitute for the land which was devised, and subsequently sold by the testator.

Where one legacy is given as a mere substitute for another, the substituted gift is subject to the incidents of the original, although not so expressed in the testamentary instrument. 2 *Wms. on Executors* 1112; *Shaftesbury v. Marlborough*, 7 *Simons* 237; *Chatteris v. Young*, 2 *Russell* 183; 1 *Jarman* 170.

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The principle cannot be universally applicable where a legacy is given as a substitute for a *devise* of real estate. Real and personal estate, by the terms of the will, may be given subject to different incidents. But in this case the real and personal estate are both limited over in the same way. The codicil contains an express republication of the original will. It must have been the intention of the testator that the bond and mortgage should be limited over to his daughter in the same manner as the land for which it was substituted. The estate of Edward W. Condict must account to the daughters of the testator for the value of the mortgage.

The price for which the mortgaged premises were sold, less the costs of the foreclosure and sale, would be *prima facie* evidence of its true value, though not conclusive. In the absence of fraud or collusion, Edward W. Condict or his estate would be entitled in equity to hold the property at the price at which it was purchased by him, though the deed was not actually delivered. The conveyance by the sheriff to Miss King of property struck off and sold to Edward W. Condict was illegal, and vested no valid title in the grantee. She can claim nothing by virtue of that deed.

The estate of Edward W. Condict must account for the price at which the land was sold, or if the sale was made by fraud or collusion, for the real value of the premises at the time of the sale by the sheriff, less the costs and expenses. The money advanced by Miss King to the sheriff, or otherwise on account of the sale, must be refunded, and the net value of the mortgage accounted for to the daughters of the testator, Edward Condict.

The executor of Edward W. Condict is not bound to return the specific articles purchased with the money received for the estate. Nor is he bound to account for the rents of the real estate or the income and profits of the personal estate accruing between the death of his grandfather (or as to the residue a year afterward) and his

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own death. The true measure of accountability is the value of the personal property received by Edward W. Condict under the bequests in the will. As to the residue, that was converted into money, and the precise amount is ascertained. It was properly paid over to him by the executor without requiring security. Where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of the year from the testator's death; and he is not bound to give security for the repayment of the money in case the event should happen. *Griffiths v. Smith*, 1 *Vesey*, jr. 97; *Fawkes v. Gray*, 18 *Vesey* 131; 2 *Williams v. Ex'rs* 1192; *Homer v. Shelton*, 2 *Metc.* 194; *Fiske v. Cobb*, 6 *Gray* 144.

As to the mode of proceedings or the form of the decree there can be no difficulty. The court disposes of the questions arising upon bills of interpleader in various modes according to the nature of the question and the manner in which it is brought before the court. If at the hearing the question between the defendants is ripe for decision the court decides it and pronounces a final decree. This course was adopted in the greatly contested case of *Hendrickson v. Decou, Saxton* 593, and in *Rowe v. Adm'rs of Hoagland*, 3 *Halst. Ch. R.* 139.

If at the hearing the case is not ripe for decision the court directs an action or an issue, or a reference to a master, as may be best suited to the nature of the case. *Angell v. Hadden*, 16 *Vesey* 203; *Seaton's Decrees* 340; *City Bank v. Bangs*, 2 *Paige* 570; 3 *Daniels' Ch. Pr.* 1765.

If the amount to which, upon the foregoing principles, the legatees of Edward W. Condict are entitled out of the estate of Edward W. Condict can be agreed upon there will be no necessity for an order of reference, but a final decree may be at once made. If this amount cannot be thus ascertained there must be a reference to a master with instructions.

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ROCKWELL and wife vs. MORGAN and others.

In proceedings for dower, if the defendant deny the complainant's right to dower the question must be tried at law.

But the court may inquire of what estate the husband died seized, and this involves an inquiry into the nature and character of the husband's right to the estate.

A bill setting up an equitable title to the land in the widow, and praying that if that claim shall fail that dower may be assigned, is not multifarious.

An objection to a bill on the ground of multifariousness, taken at the hearing, is not much favored.

Where the guardian of a female infant wrongfully converted the personal estate in his hands into lands, placing the title in a third person, who afterwards conveyed the same to the husband of the infant, upon the death of the husband the widow cannot claim an equitable title to such lands.

Richey and Beasley, for complainants.

Vroom, for defendants.

THE CHANCELLOR. The objection is raised *in limine* that the complainants' bill is bad for multifariousness. The precise objection raised by the answer is, that "by the practice of this court the complainant cannot, in a bill for dower and account, call in question or try the title of the defendant as heir at law or devisee, or pray any relief in that respect." Is the objection valid in either form?

This court clearly cannot try or decide a question of legal title, nor decide whether a widow is legally entitled to dower when the legal right is denied. If the defendants deny the complainants' right to dower the question must be tried at law. *Curtis v. Curtis*, 2 *Brown's Ch. R.* 632; *D'Arcy v. Blake*, 2 *Sch. & Lef.* 390; 2 *Daniel's Ch. Pr.* 1343.

But the court not only may, but must of necessity inquire of what estate the husband died seized, and this

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involves an inquiry into the nature and character of the husband's right to the estate. In *Curtis v. Curtis* there had been a decree directing that an account should be taken of the rents and profits of the freehold estate of Paul Downton Curtis. The court subsequently said, there seems to have been a slip in the former decree, and that the infant must now have an inquiry as to what estates Paul Downton Curtis died seized of. In this case there is no denial of the husband's legal seizin of the land in question. The bill states the fact, but alleges that the equitable title is in the wife; that the land was purchased by her guardian with her money; that he stood seized to her use, and that in breach of his duty as trustee he conveyed the land during her minority to her husband. She therefore claims to be entitled in equity to the land, and asks an account of all the rents and profits. But if that claim is not well founded, she then asks that she may have her dower in that land. These are certainly not distinct and independent claims. It presents the ordinary case of a bill filed with a double aspect. The bill found in Mr. Van Huytheysen's valuable collection of precedents, "Equity Draftsman" 175, claims not only dower but an annuity under the husband's will, and is filed against the executor as well as against heirs and devisees. The equitable claim must be disposed of before the title to dower can be settled. It must be disposed of in this court, and the only question would seem to be whether she was bound to file a separate bill to have the question litigated before filing her bill for dower. No demurrer was interposed. The evidence has been taken, and the rights of the parties fully investigated. No embarrassment has resulted from this course, and no possible advantage could result from dismissing the bill upon a mere technical objection at this stage of the cause. An objection to a bill on the ground of multifariousness frequently resolves itself into a question of expediency. On the one hand, the bill should be sufficiently extensive to

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answer the purposes of complete justice, on the other hand, distinct and independent matters are not to be united in the same bill. The matters in this bill are not so distinct and independent as technically to constitute the vice of multifariousness. The objection at this late stage of a cause is not favored, even if technically a demurrer might have been sustained. *Hays v. Doane*, 3 Stockl. 84; *Whitney v. Whitney*, 5 Dana 327.

The strict rule is, that the objection must be raised by demurrer, and cannot be by the defendant at the hearing; though the court may *sua sponte* take the objection at the hearing. *Story's Eq. Pl.* § 271, note 5, and cases there cited.

The material question in the cause is, whether the complainant is entitled in equity to an account of all the profits of the real estate in the city of Trenton of which the husband died seized. The leading facts upon which the question depends are not controverted. The complainant, Mrs. Rockwell, while a minor, became entitled, under the provisions of her father's will, to personal property amounting to \$5000. Her mother became her guardian, and placed or left the complainant's funds in the hands of her brother, Jefferson Blackwell, who was acting executor of the father's will. A sister of the complainant, who had attained her majority and was married to John A. Weart, was entitled to the like sum of \$5000. On the 18th of January, 1830, the money of the complainant, by the assent and direction of the guardian, was vested jointly with that of Mrs. Weart, in the purchase of real estate in the city of Trenton, and a deed taken in the name of John A. Weart and Jefferson Blackwell. On the 10th of June, 1832, the complainant intermarried with Charles Morgan. On the 15th of April, 1834, the complainant still being a minor, Jefferson Blackwell, by deed of bargain and sale, conveyed the property to Charles Morgan, the complainant's husband, for the nominal consideration of one dollar.

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The property in the hands of the guardian was personal estate. It was bequeathed as such to the complainant, and directed to be paid over by the executor as personal property. It was, without authority of law, converted into real estate, and the deed therefor taken in the name of the executor.

In the eye of the law it continued personal estate. The executor was bound to account for it as such. Upon the marriage, the husband was entitled to recover it and reduce it into his possession as personal property. That the husband chose to accept a deed for land, in which his wife's money had been invested by the guardian without authority of law, did not deprive him of his legal rights over the fund as the personal property of his wife. He had an unquestionable right to recover the money from the guardian as personalty, and to invest it the next moment in real estate in his own name. In effect that was precisely what he did. He accepted the land in lieu of the money. Neither the unauthorized conversion of the personal estate of the ward into realty, nor the acceptance of the land by the husband in lieu of the money to which he was entitled, can essentially alter the character of the transaction.

The argument in favor of the right of the complainant is, that the money of the ward having been used in the purchase of the real estate there was a resulting trust in favor of the minor, and equity would regard it as her land, though the title was taken in the name of another; that the personal estate of the ward having been converted into real estate, such conversion would be legal with the assent of the ward upon her attaining her majority, as she might then elect to take the land or the money; that after the marriage, the ward continuing a minor, the right of election devolved on the husband, and he was authorized to assent to the conversion; that by accepting the deed for the land he did in fact assent to the conversion and elect to take the money as real estate.

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The reasoning, though plausible, is not sound. As against the purchaser, who used the minor's money in the purchase of the land, and took the title in his own name, equity would regard the *land* as belonging to the minor, but not as against the husband. The fact that the fund was thus invested in land could not interfere with the rights of the husband. He had a right to recover the money—to reduce it into possession as personal property. It may be questioned whether he was bound even to make an equitable provision for his wife out of the fund, for it might have been recovered at law without the aid of a court of equity. 2 *Story's Eq. Jur.* § 1403; 2 *Kent's Com.* 139.

Had the husband accepted from the guardian, in satisfaction of his claim, a *deed made to his wife*, his assent to the conversion and his election to take the property as land might fairly be implied. But no such assent or election can be implied from the fact that he accepted from the guardian or debtor of his wife a deed to himself in satisfaction of his claim.

There is no suggestion of any fraud or unfairness on the part of the husband. It was not only a lawful, but a natural and ordinary transaction. It is precisely what was done with the share of the sister of the complainant, which was invested in the purchase of an undivided moiety of the same land at the same time. The deed for the sister's share of the land, though purchased with her money, was made to her husband, and not to her. The title for the complainant's share was originally taken in her brother's name, and after her marriage transferred to her husband. And the two husbands continued for many years, and until the death of Weart, to stand seized of the land thus purchased, as tenants in common in their own names, without an intimation that the investment was unauthorized or inequitable. Both the complainant and her mother, who was her guardian, admit that they knew that the title was in the husband. The mother

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rs that it was wrong, though she raised no voice against

The complainant says she yielded to it because her husband desired it. In fact, though it may now be felt to be a matter of regret, it is not perceived that either or both of them could have prevented it otherwise than by a settlement previous to marriage. I am of opinion that the husband rightfully took title to the land in his own name; that he took it as personal estate without any intent to the conversion of the personal into real estate; and that the wife has no equity which can be enforced against the legal title of the husband. The complainant is entitled to her dower only in the estate.

Aside from the question of strict right, it is a consideration of some moment that this arrangement was not only acquiesced in by the complainant for twenty years during the life of the husband, but for five years after his death she continued to recognise her husband's title to the land as perfect, and to receive her thirds from its income as a widow. Though but little importance is ordinarily attached to the silence of a wife, so long an acquiescence in a transaction, both during coverture and afterwards, seems far to sanction a transaction which would otherwise have been of doubtful validity.

In regard to the real estate in the county of Middlesex, there is no question as to the complainant's right to dower. The complainant is entitled to dower in the whole real estate of her husband and to an account of the rents and profits.

The widow is entitled to dower in the clay banks as well as in any other part of the inheritance. Dower is assignable in mines, quarries, and in whatever is part of or appurtenant to the land of which a woman hath dower, and that whether it be assignable by metes and bounds or not. *Stoughton v. Leigh*, 1 Taunt. 402; 9 Viner's Ab. 212, *over D.*; *Park on Dower* 115.

The only question that can arise will be in regard to the mode of assignment, whether by metes and bounds or

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by a share of the profits. That course should be adopted which will be most favorable to the widow and which will most effectually secure the enjoyment of her right. There can be no difficulty in taking an account of the profits. It appears, from the answer, that the clay banks have been worked in connection with the farm, and the profits of the clay may be ascertained as well as of any other part of the property. Working the banks is a mere mode of enjoyment.

The complainant is entitled to dower and to an account of the rents and profits from the death of the husband.

HENRY H. STOTESBURY vs. GEORGE VAIL.

A parol surrender of demised premises, although invalid at law by reason of the statute of frauds, will be sustained in equity when consummated by a delivery of the counterpart of the lease, the key of the dwelling, and the possession of the premises to the landlord.

In such case the court will enjoin the collection of the after accruing rent. When the ends of justice require it, the injunction will be continued to the hearing.

If the defendant is absent from the country, his oath to the answer must be taken under a commission.

Affidavits annexed to an answer need not be taken on notice, nor is it necessary to serve copies, unless in special cases, under the rules of the court.

Chandler, for motion.

Little, contra.

THE CHANCELLOR. The injunction in this case issued to restrain the defendant from proceeding at law to recover rent upon a lease made by the defendant to the complainant. The material charges of the bill are, that Vail leased to Stotesbury a house, garden, and pleasure grounds at Speedwell for four years from the first of

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April, 1857, at a yearly rent of \$500, payable quarterly; at prior to the first of April, 1859, the lessee agreed, with the agent of the lessor, to surrender the premises on that day; that the counterpart of the lease held by the lessee was, together with the key of the house, delivered to a relative of the lessor, and the possession of the premises given up by the lessee in pursuance of the agreement; that the premises were entered upon by the agent of the lessor, repairs made, and the premises leased to another tenant. The complainant insists that, the surrender not being valid at law, he is entitled in equity to be relieved from the payment from and after the 1st of April, 1859, when the possession of the premises was given up by him to the lessor. The defendant, having answered the bill, asks a dissolution of the injunction.

One of the grounds of defence relied upon in the answer is, that the bill is filed in violation of the tenth section of the act for the prevention of frauds and perjuries, with the intent to evade the provision of the statute, and to deprive the defendant of his rights under the same. The provision of the statute referred to is, that no lease, estate, interest, or term of years shall be assigned, granted, or surrendered, unless it be by deed or note in writing. *ix. Dig.* 330, § 10. And it is insisted that, inasmuch as no surrender in writing has been made, a court of equity will not sustain the validity of the surrender, and thus violate the express provision of the statute.

"It is obvious," says Mr. Justice Story, "that courts of equity are bound as much as courts of law by the provisions of this statute, and therefore are not at liberty to disregard them." They interfere in cases within the reach of the statute, not upon any notion of a right to dispense with it, but for the purpose of administering equities subservient to its objects or collateral to it or independent of it. 1 *Story's Eq. Jur.* § 754.

Courts of equity will enforce the specific performance of a contract within the statute where the parol agree-

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ment has been partly carried into execution. 1 *Fonb. Eq.*, book 1, ch. 3, § 8; 2 *Story's Eq. Jur.* § 759; *Fry on Specific Perform.* § 383, 388.

The distinct ground upon which courts of equity interfere in such cases is to prevent the perpetration of a fraud. "Courts of equity, in dealing with the entire subject of contracts within the statute of frauds, introduce a principle beyond the province of a court of law to regard. Where, upon the faith of a verbal contract for an interest in land, a party has entered and incurred expenses and improved the premises, they will, as a general rule, enforce the contract against the other party on grounds of equity and conscience and to prevent what would be in the nature of a fraud." *Browne on Stat. of Frauds* § 31; *Hill v. Chaffee*, 13 *Verm. R.* 150.

The doctrine applies as well to cases arising under the 10th section of the statute as under any other of its provisions. When the tenant enters into a parol agreement with his landlord to make a surrender of the demised premises, and in pursuance of the agreement provides another residence, abandons possession of the premises, delivers his counterpart of the lease and the key of the dwelling to his landlord, giving him the entire control, it would be most inequitable to permit the landlord to recover rent from the lessee upon the ground that the surrender was not made in writing in pursuance of the statute of frauds. It is clearly within the province of a court of equity, by its interference, to prevent such injustice. In *Natchbott v. Porter*, 2 *Vernon* 112, it was held that where a lessee for years, having agreed with his lessor to surrender his lease, delivers up the key, which the lessor accepts, but afterwards refuses to take the surrender of the lease, the lessee should be discharged of the rent. The case is a remarkable one, from the fact that there was a recovery by the reversioner against the original lessee for the rent. His executor thereupon brought his bill against Porter, the assignee of the term, to be

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reimbursed according to his covenant of indemnity on the assignment. Porter, who was not a party to the bill against his assignor, by his answer set forth the agreement with the reversioner to surrender the term, the delivery of the key, and his acceptance of it, and therefore insisted that he ought not to be charged; and the court, upon the hearing of the cause, was of opinion that the agreement was well proved and a good discharge, and Porter not liable to answer any rent after that time.

The objection to the bill is not well taken. If the case made by it is sustained by evidence the complainant is clearly entitled to relief.

The second ground for dissolving the injunction is, that the equity of the bill is denied by the answer. Some of the material allegations of the bill are fully denied by the affidavit of the attorney and agent of the defendant, who had the management and control of the business on behalf of the defendant. But it is not denied that there were negotiations between the lessee and the attorney of the lessor for a surrender of the premises on the 1st of April, 1859; that after such negotiation the lessee purchased a residence, and prepared to remove upon the 1st of April; that soon after the 1st of April he left the premises, and delivered his counterpart of the lease, together with the key of the house, to a friend and relative of the lessor, who, to some extent at least, acted as his agent; and that from that time the lessee ceased to occupy the premises, and exercised no control over them. There is no suggestion in the answer of any want of good faith on the part of the lessee in these transactions, nor of any fraudulent combination between himself and the party to whom he surrendered the lease and the key as the agent of the lessor; nor does any intimation appear to have been given to the lessee of any want of authority in the supposed agent to accept the surrender or of any intention to hold the lessee liable upon his covenants in the lease. Under these circumstances, I deem it a proper

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case to continue the injunction until the case can be heard upon the merits.

Even where the equity of the bill is fully denied by the answer, the continuance of the injunction till the final hearing is a matter resting in the sound discretion of the court. In this case the ends of justice will be better answered by its continuance. *Chetwood v. Brittan*, 1 *Green's Ch. R.* 439; *Greenin v. Hoey*, 1 *Stockt.* 137; *Furman v. Clark*, 3 *Stockt.* 135.

I adopt this course the more readily, inasmuch as, upon a formal ground urged upon the hearing, the motion to dissolve the injunction must necessarily have been denied. At the time of filing the answer the defendant was abroad, and the answer was not sworn to by him. It was verified simply by the affidavits of the agent and friend of the defendant, who were cognizant of the material facts. This is not sufficient. The complainant is entitled to the benefit of the defendant's own oath. If he is absent from the country, it may be taken under a commission. *Trumbull v. Gibbon*, *Halst. Dig.* 225; 2 *Daniels' Ch. Pr.* 844, 857; *Read v. Consequa*, 4 *Wash. C. C. R.* 335.

I am aware of no case where an answer not sworn to by the defendant himself has been received after objection. Where no answer is put in, the case may be heard upon affidavits taken upon two days' notice, which the adverse party may rebut by counter affidavits. *Rule II*, § 3. This course was not adopted in the present case.

The objection, that the affidavits annexed to the answer are inadmissible on the ground that copies of the affidavits were not served upon the adverse party, is not well taken. Affidavits annexed to a bill or answer are not required to be taken upon notice, nor are copies of such affidavits to be served, except where specially required by the rules of the court.

Since the argument of the cause, the court has been furnished by the complainant's solicitor with an affidavit of the defendant verifying such facts stated in the answer

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as are within his knowledge. If this were the only difficulty in the cause, I should be disposed, notwithstanding the irregularity, to permit the answer to be verified by the oath of the defendant. But it would not, under the circumstances, vary the conclusion at which I have arrived in regard to the disposition of the case.

The motion to dissolve must be denied with costs, and the injunction continued till the final hearing.

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An order to deliver possession to the purchaser of mortgaged premises sold under a decree of foreclosure will be made only upon notice of the application and proof that the deed was shown to the tenant, that a demand of possession was made, and that the tenant refused to comply.

The injunction, as well as the attachment to enforce obedience to the order, is disused.

Under the present practice, the writ of assistance does not issue of course, but upon notice of the application and proof of the services of the order to deliver possession and refusal to obey.

Application on behalf of a purchaser of mortgaged premises, sold under and by virtue of a decree of foreclosure, for an order to deliver possession of the premises, in order to obtain a writ of assistance.

Carpenter, for petitioner.

THE CHANCELLOR. The petitioner asks for an order upon the tenant in possession to deliver to the purchaser the possession of mortgaged premises sold under execution issued out of this court upon a decree of foreclosure. The order is asked for with the view of obtaining a writ of assistance in case the possession is not surrendered. The application is not regular. To obtain the order, it is necessary to prove—1, notice of the application duly

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served; 2, that the deed was shown to the tenant, a demand of the possession made, and a refusal to comply. *Kershaw v. Thompson*, 4 Johns. C. R. 609; *Ludlow v. Lansing*, Hopkins 231; *Valentine v. Teller*, Hopkins 422.

The order is not a matter of course. The tenant may be in possession by title paramount to that of the mortgagor or may have other good objection to the application. He is entitled to be heard before an order is made upon him to surrender possession of the premises. If he have no defence, he ought not to be subjected to the costs of the proceeding without an opportunity of being heard.

Notice of application for the writ of assistance will not obviate the necessity nor supply the want of the notice of the present motion. The immediate design of the two orders is totally distinct. The defendant is entitled to be heard in opposition to both. By the ancient practice of the Court of Chancery, after a decree for the delivery of possession had been served, and obedience thereto refused, application was made—1st, for an attachment; 2d, for an injunction; 3d, for a writ of assistance. The two preliminary orders were made upon notice and proof. The writ of assistance issued of course and without notice, but it was always preceded by the preliminary order for injunction and proof of refusal to obey the decree.

The subject was considered in *Schenck v. Conover*, decided in October term, 1860; and it was then suggested that the injunction might advantageously be dispensed with in accordance with the modern practice in England and in New York. 2 Daniels' Ch. Pr. 1280; *Valentine v. Teller*, Hopkins 422.

I am satisfied that the practice in this particular should be uniform, and that the use of the injunction should be entirely discontinued. It is a useless encumbrance and expense. It is now in fact rarely used, and only serves to embarrass practitioners. The injunction and the proof preliminary thereto being disused, the writ of injunction can issue only upon notice and proof of the service of the order to deliver possession and refusal to obey.

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HARING vs. KAUFFMAN and others.

To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him.

Personal service will be dispensed with where the party is out of the state or cannot be found.

The modern practice is for the court, by special order, to dispense with personal service where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper.

The court will punish the violation of its order for the injunction though the writ be not served, if it appear that the defendant knew of its existence.

Where the defendant and his wife were nonresidents, and the injunction was served out of the state on the husband, and proof was made that the wife could not be found, an order was made that such service should be deemed valid, and directing a copy of such order to be served at the dwelling house of the defendants.

Lyons, for complainant.

THE CHANCELLOR. The bill seeks, among other things, to set aside, as fraudulent, certain conveyances made by John F. Kauffman, the defendant, to Christian Vogel, bearing date on the 27th of November, 1860, a reconveyance of the same premises, by deed of even date, from Vogel and wife to Eve, the wife of Kauffman, and a mortgage of the same premises from Kauffman and wife to Rose, the wife of Vogel, for \$2000, dated on the 16th of April, 1861. An injunction issued to restrain Kauffman and wife from conveying or encumbering the premises, and also to restrain Vogel and wife from transferring the mortgage or collecting the mortgage debt. Kauffman resides in this state; Vogel resides in the city of New York. The subpoena was served personally on the wife of Kauffman, and on Kauffman himself, by leaving a copy at his dwelling house. The injunction was served personally on the wife of Kauffman, in this state, and a copy left with her at the place of abode of her husband. The injunction was served upon Vogel, by showing him

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the original, and leaving a copy with him at his place of abode in the city of New York. The affidavits show that neither Kauffman himself nor the wife of Vogel could be found after diligent search and inquiry. The complainant now moves that the service of the injunction, thus made as aforesaid, be deemed and taken to be a valid and sufficient service thereof upon all the said defendants.

To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him. *Wyatt's Prac. Reg.* 232; 1 *Newland's Ch. Pr.* 231; 3 *Daniels' Ch. Pr.* 1818; 1 *Eden on Injunc.* (by *Waterman*) 93; 1 *Barbour's Ch. Pr.* 590.

Personal service will be dispensed with where the party is out of the state or cannot be found.

It would seem, from some of the earlier cases, that leaving the injunction at the dwelling of the defendant was a sufficient service, without a special order of the court to warrant or confirm it. Thus, in the 19th and 22d years of Elizabeth, an attachment was ordered, upon proof that the writ of injunction was left at the house of the defendant, and that he had disobeyed it. *Holgate and Wife v. Grantham, Cary* 58; *Bodnam v. Morgan, Cary* 101.

The modern practice is for the court, by special order, to dispense with personal service where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper. *Wyatt's Prac. Reg.* 232; *Eden on Injunc.* (by *Waterman*) 76.

In *Pearce v. Crutchfield*, 14 *Vesey* 206, it was ordered that service of the injunction at the house which appeared to be the last place of abode of the defendant, though afterwards apparently shut up, should be good service.

The propriety of the order asked for, as regards the service of the writ upon Kauffman, is clear. He is within the state, has been legally served with process of subpoena, and a copy of the injunction has been left at his dwelling

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house. The affidavits, moreover, warrant the belief that he is endeavoring to avoid the service of the injunction.

There is more room for question as to the propriety of the order in regard to the service of the writ on Vogel and wife. It is true that the writ was served personally upon Vogel, and a copy left with him at his dwelling house, the wife not being found, and the affidavits warranting the belief that she, also, is endeavoring to avoid the service of the injunction. The mode of service is substantially the same in both cases; but the material difference lies in the fact, that the service upon Vogel and wife was made out of the state, the defendant not having been previously brought within the jurisdiction of the court by the service of a subpoena. The mode prescribed by the statute for effecting the appearance of the defendant has, however, been adopted, and is in the process of completion. I incline to think that no principle or rule of practice will be violated by maintaining the legality of the service. The ends of justice manifestly require it. All that is required to enable the court to enforce obedience to its process, is that the defendant should have knowledge of the order for the injunction. The court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence. *Kimpton v. Eve*, 2 Ves. & B. 349; *Hearne v. Tenant*, 14 Ves. 136; *Skip v. Harwood*, 3 Atk. 564; *James v. Downes*, 18 Ves. 522; 1 *Eden on Injunc.* 94; *Dreury* 399; *McNeil v. Garrett*, 1 *Craig & Ph.* 98; *Hull v. Thomas*, 3 *Edw's Ch. Rep.* 236.

If the injunction was properly granted, the service, though out of the state, answers all the ends for which it was intended. It apprizes the party of the order of the court.

The motion will be granted, and the service of the injunction upon all the defendants declared valid.

It is proper that a copy of this order should be served upon the parties, either personally or by leaving a copy

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at the dwelling house of each of them within twenty days from the date of the order.

Order accordingly.



JOB H. GASKILL vs. SINE and wife.

Where two lots are mortgaged to secure the same debt, and one of them is subsequently sold and conveyed by the mortgagor, the other lot is primarily liable under the mortgage.

A release subsequently given by the mortgagee to the mortgagor upon the remaining unsold lot, without the assent of the purchaser of the lot sold, will not prejudice the rights of the purchaser.

If the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the lot first sold; but if sufficient to satisfy only a part of the debt, such first sold lot, in the hands of the purchaser, will be answerable for the deficiency.

Reference ordered to ascertain the amount due on the mortgage and the value of the premises released.

Wilson, for complainant.

Merritt, for defendant.

THE CHANCELLOR. The complainant's bill is filed to foreclose a mortgage given by Israel Gaskill to James S. Budd, on the 30th of August, 1849, upon two lots of land. On the 6th of October, 1849, the mortgagor conveyed lot number two to Louisa Sine, the wife of the defendant, by deed with covenant of general warranty. On the 15th of July, 1850, the mortgagee released to the mortgagor lot number one, and on the 5th of August, 1850, assigned the mortgage to the complainant.

Sine and wife, who claim title to the lot number two, insist, by way of defence, that lot number one, having been retained by the mortgagor after the sale of the lot to the defendants, the lot so retained must be first subject to the mortgage debt, and the lot of the defendants can

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only be resorted to to make up any deficiency that may exist upon such sale, and that the mortgagee, having released to the mortgagor all right to the lot retained by him after the conveyance to the defendants, has no right to look to the defendants' lot for any part of the mortgage debt, but that the same is released from the encumbrance of the mortgage. The facts which constitute this ground of defence are admitted, and their effect upon the rights of the parties is obvious. The defendants, as the purchasers of one of the lots mortgaged, are entitled to throw the whole encumbrance upon the lot retained by the mortgagor, if that is sufficient to discharge the debt, and the mortgagee can only resort to the defendants' lot to supply the deficiency, if any exist.

A release, subsequently given by the mortgagee to the mortgagor, of the mortgage upon the lot remaining unsold, without the assent of the purchaser of the lot sold, will not prejudice the rights of the purchaser. This was declared by the late Chancellor to be the effect of these admitted facts upon the rights of the parties in his case when the question was before him. The doctrine is a familiar one, and is sustained by numerous authorities. *Mickle v. Rambo*, Saxton 501; *Shannon v. Marcellis*, Saxton 413; *Stevens v. Cooper*, 1 Johns. Ch. R. 425; *Union v. Knapp*, 6 Paige 35; *Patty v. Pease*, 8 Paige 277.

There is no foundation for the idea, that the subsequent release by the mortgagee of the lot retained by the mortgagor deprived the mortgagee of all remedy against the first lot. It can produce that result only where the lot released is sufficient to satisfy the entire mortgage debt. The release in no wise affects the interest of the purchaser of the lot first sold. He is entitled, in any event, to throw the mortgage on the other lot, so far as it will satisfy the debt. If the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the lot first sold. He must bear the loss. If sufficient to satisfy only a part

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of the debt, the lot in the hands of the purchaser will be answerable for the deficiency.

A second ground of defence presented by the answer is, that the complainant acted as the agent or trustee of the mortgagor in procuring the assignment of the mortgage, and that the consideration paid for the assignment was the money of the mortgagor. No replication having been filed, the answer upon the former hearing was taken as true, and the Chancellor held that the bill, upon this state of the facts, was virtually by the mortgagor himself; that the complainant had no equity, and that the bill must be dismissed. The decree having been opened, a replication filed, and evidence taken upon this part of the defence, the question is now presented, whether this defence is sustained in point of fact. The defence consists of new matter not responsive to the bill, and must be sustained by evidence. No evidence is produced in its support. The fact, that the complainant is a brother of the mortgagor, and that he holds a conveyance of his real estate in trust for him, amounts to nothing. It is shown affirmatively, by the complainant, that the consideration was advanced by himself, and there is no proof that any part of it was received directly or indirectly from the funds of the mortgagor.

The fact, that the conveyance by the mortgagor to the defendant's wife was not made for a valuable consideration, but for natural love and affection, will not affect the rights of the parties. The deed contained a covenant of warranty. It was duly recorded. The assignee of the mortgage took the assignment with full notice of the rights of the defendants.

The objection, that the prayer of the bill is defective, is without foundation. The complainant might have the relief to which he has shown himself entitled under the ordinary prayer of a bill of foreclosure contained in the bill as originally filed. Under a prayer for the sale of the entire mortgaged premises to pay the whole debt, the

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omplainant may have a decree to sell such portion of the premises to pay such part of the debt as the evidence may warrant. But the prayer to the amended bill has anticipated the defendants' objection, and is precisely adapted to the relief granted.

The complainant is entitled to an account and a decree against the defendants for the foreclosure and sale of the lot conveyed to Louisa Sine, to satisfy so much of the mortgage debt as the premises released will be insufficient to satisfy. A reference will be ordered to ascertain the amount due upon the mortgage and the value of the premises released.

RACHEL SKILLMAN vs. JOHN G. SKILLMAN.

At common law, the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture.

Though a gift from the husband to the wife is void at law, it will be protected in equity as against the husband, and if made by virtue of an ante-nuptial agreement, as against his creditors also.

A married woman purchasing land with the knowledge and approval of her husband, the title being taken in the name of the husband, and he executing a mortgage thereon for the cost of a dwelling subsequently erected, will acquire no equitable title to the premises, as against the husband's creditors, on the ground that she mainly contributed to paying off the mortgage from the avails of her labor during coverture.

Leupp, for complainant.

Speer, for defendant.

THE CHANCELLOR. The bill charges that, in the year 1847, the complainant, with the knowledge and approval of her husband, Daniel Skillman, (who was a man of small means and dependant upon his labor for support)

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purchased a small lot in the city of New Brunswick, for the sum of \$175, with the design of erecting thereon a dwelling for the use of herself and her family; that the said Daniel Skillman paid the purchase money for the said lot, and the same was conveyed to him by deed, dated the 8th day of January, 1847; that a dwelling was forthwith erected upon the said lot at a contract price of \$675, for \$500 of which a mortgage was given by Daniel Skillman and his wife, the complainant, upon the said house and lot; that the interest upon the said mortgage, up to May, 1854, together with \$100 of the principal, was paid by the complainant from her own earnings; that in April, 1851, the husband subscribed for two shares in the Mechanics Building and Loan Association of New Brunswick, and that the complainant contributed from time to time of her own earnings to pay the monthly instalments upon said shares; that, in 1858, a loan of \$400 was obtained from the said association to satisfy the original mortgage upon the said house and lot, and that the contributions for interest upon the said loan and the monthly payments to the said association have been principally paid by the complainant out of her earnings, the husband contributing from the avails of his labor but little to those objects; that the payments thus made, together with the value of the two shares of stock in the building association, are nearly sufficient to extinguish the mortgage debt upon the said house and lot; that the complainant has thus, from her own earnings, derived from keeping boarders and from washing and ironing, contributed largely toward the building of said house and keeping it in repair during the lifetime of her husband, and without the knowledge of any encumbrance upon the said premises; that Daniel Skillman, the husband of the complainant, died on the 20th of June, 1860; that since his death the said house and lot have been advertised for sale by the sheriff of the county of Middlesex, by virtue of an execution issued out of the Supreme Court upon a judg-

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ient confessed by the said Daniel Skillman to his brother, John G. Skillman, on the 24th of May, 1850; that the said judgment was fraudulent, and was entered for the purpose of protecting the property of the said Daniel Skillman from his creditors, and was without consideration, equitable or legal.

The bill prays that the interest of the complainant in the premises may be protected; that the defendant may be restrained from making sale of the said premises, and that the said judgment and execution may be set aside.

An injunction issued, pursuant to the prayer of the bill, restraining the sale by virtue of the said execution until the further order of the court.

The answer of John G. Skillman denies all fraud in the entry or procurement of his judgment against the said Daniel Skillman; professes entire ignorance in regard to the advances alleged to have been made by the complainant toward the purchase of the said house and lot, and insists that, if such advances were made as set out in the complainant's bill, she thereby acquired no separate interest in the said real estate.

The defendant now asks a dissolution of the injunction.

The complainant asks relief against the judgment at law on two distinct grounds, viz. 1, because she has an equitable interest in the property levied upon to satisfy the judgment; 2, because the judgment is fraudulent.

The fraud is fully denied by the answer. The complainant, moreover, has no standing in court, and no right to question the *bona fides* of the judgment, unless she has some interest in the property to be prejudiced by the judgment. She does not claim dower in the property, or could such claim be in anywise affected by the judgment and execution against her former husband. If the property in question be sold to satisfy the judgment against Daniel Skillman, the right of the complainant, as a widow, to dower is not affected.

Nor is the case at all strengthened by the prayer of the

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complainant to have the right of her infant daughter, the only child and heir at law of Daniel Skillman, protected against the operation of the judgment. The daughter is not a party to the bill. No decree can be made either for or against her interests. The bill does not purport to be filed in her name or on her behalf. On the contrary, the claim of the complainant, as set out in the case, is not only distinct from and independent of the title of the daughter as heir at law of Daniel Skillman, but is inconsistent with it. She claims to have an equitable title to the property superior to that of her husband at the time of his death, which, if valid, is fatal to the title of his heir at law.

It seems evident, therefore, that the only equity of the complainant's bill, and her sole ground of relief, rests upon her claim to an equitable estate in the house and lot in question. If she have no such estate, she has no ground upon which she can contest the validity or *bona fides* of the judgment at law.

The complainant does not claim that she owned any property, real or personal, at the time of her marriage, or that she ever received any property by gift, grant, devise, or bequest during her coverture. The claim is, that the separate property consisted exclusively of her earnings, the fruits of her own industry acquired during her coverture, and by and with the consent and approbation of her husband invested in the erection and improvement of the dwelling house and lot in question. The claim is not within the protection of the statute. *Niz. Dig.* 466. It must be sustained, if at all, upon general principles of equity and upon the rules of the common law, independent of the statute.

At common law, the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture. His right to her services and to the proceeds of her skill and industry is absolute.

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he may sue for and recover them in his own name. If he did to the wife, without the authority and against the objection of the husband, he may nevertheless recover them. *Buckley v. Collier*, Sal. 114; *Glover v. Proprietors of Drury Lane*, 2 Chitty 117; *Bac. Ab. Baron and Feme*, 1; *Reeves' Dom. Rel.* 63; *Clancy on Husb. and Wife* 3.

If, therefore, the complainant has acquired any separate property in her earnings, it must be by gift from her husband. Though, by reason of the unity of person subsisting between them, such gift from the husband to the wife is void at law, it will be protected in equity as against the husband, and if made by virtue of an antenuptial agreement as against his creditors also. *Slanning Style*, 3 P. Wms. 337; *Lucas v. Lucas*, 1 Atk. 270; *Valler v. Hodge*, 2 Swanst. 109; *Clancy on Husb. and Wife*, 16, 277; 1 Bl. Com. 442, note 29.

The husband will be treated in equity as a trustee of the property for the benefit of the wife.

But in such cases the fact of the making of the gift, and that it was intended for the use of the wife as her separate property, must be clearly established.

To constitute a valid gift, there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as trustee for the separate use of the wife. *McLean v. Longlands*, 5 Vesey 8; *Mews v. Mews*, 15 Beavan 529 (21 Eng. Law and Eq. Rep. 556).

Applying these principles to the case under consideration, I find nothing to justify the claim of the wife to have his property treated as her separate estate. The husband bought the land, paid the purchase money, and took the title in his own name. He paid part of the contract price for building the house, and gave a mortgage upon the premises for the residue—his wife, as is usual, joining in the mortgage. He bought the shares of the building and loan association in his own name; he contributed, to some extent, from the avails of his labor toward the

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payment of the debt; the title remained in him at his death. The facts relied upon in support of the complainant's claim are, that the property was purchased at her instance to secure a home for herself and her family; that she made the negotiation for the purchase; that, by means of her industry and economy, she contributed mainly toward the payment of the interest on the debt, the monthly payments on the shares of the building association, and the accumulation of means for the extinguishment of the principal. The price of the lot and some portion of the debt incurred in erecting the building, it is admitted, were paid by the husband; and if a clear case of gift were alleged or proved there might be serious difficulty in ascertaining upon the case, as made by the bill, the precise extent of the wife's interest in the land. But conceding that the wife had not paid a part, but the entire cost of the land and building from the avails of her industry with the knowledge and approbation of the husband, the complainant's case is not materially strengthened. The question still remains, did the husband intend that that property should become the separate property of his wife. He approved of her accumulating it, of its being applied by her to paying the debt incurred in erecting the house, and thus securing a home for the family. But the avails of her labor were his property, and they were applied in payment of his debt and in the extinguishment of an encumbrance upon property the title to which was in him. How, then, do these acts indicate a disposition on the part of the husband to give the property to the wife as her separate property? It presents the ordinary case of persons in the humbler walks of life, with limited means, securing for themselves the comforts of a home by the united industry of the husband and wife, or it may be by the industry, economy, and self-denial of the wife alone. However strongly it may appeal to our sympathy, it affords no ground upon which the court can subvert the well settled

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rules of law, and declare that the husband shall cease to be the owner and become the trustee for the benefit of his wife of the avails of her labor.

In *Raybold v. Raybold*, 8 *Harris' R.* 308, it was decided that the fact that real estate was paid for with the earnings and savings of the wife, does not give her a trust estate in the property, and that money thus acquired is not the property of the wife within the meaning of the act relative to the estates of married women, but is the property of the husband.

And even where a married woman carries on business in her own name, the avails of the business are not protected by statutes similar to our own in relation to married women, but they remain the property of the husband, liable to be seized and taken in execution for the payment of his debts. *Lovett v. Robinson*, 7 *Howard's Pr. R.* 105; *Avery v. Doane*, 3 *Am. Law Reg.* 229; *Freeman v. Orser*, 5 *Duer* 477.

The law, in this respect, has been altered by the recent statutes of the state of New York. *Session Laws*, 1860, chap. 90, p. 157.

Considering the complainant's case entirely irrespective of the conflicting claim of the husband's creditor—regarding it as a question solely between herself and the heirs of her husband—there is nothing in the case to justify the court in treating the property as the separate property of the wife, in exclusion of the title of the heir. The case is much stronger against the complainant when urged against the rights of the creditors.

The injunction must be dissolved, and the bill dismissed or want of equity.

In accordance with the decision of the master of the bills in *Mews v. Mews*, 15 *Beavan* 529, the bill is dismissed without costs.

Vanderhaise v. Hugues.

NOEL VENDERHAISE vs. CHARLES A. HUGUES and others.

Where a deed of conveyance, absolute in its form, was made, and the grantee executed a covenant, bearing even date, to reconvey upon the payment of a certain sum within a specified period, and it appeared that the deed was intended as a mortgage to secure certain loans, *held*—

1. That the grantor was entitled to redeem.
2. That the grantee of the premises should account for the rents.
3. That credit should be given to the grantee for necessary repairs, costs of insurance, and lasting improvements, but no allowance for renting or taking care of premises.

Winfield, for complainant.

Boyd, for defendants.

THE CHANCELLOR. On the 25th of November, 1856, Noel Vanderhaise and Maria his wife, by deed of bargain and sale, conveyed to Charles A. Hugues, the defendant, a parcel of land, consisting of four adjacent lots in Hudson City, with the improvements thereon. By a covenant, bearing even date with the deed, Hugues, the grantee, covenanted with the grantor, at the expiration of three years from the date of the defeasance, upon the repayment by Vanderhaise to Hugues of the sum of \$3000, with interest at seven per cent. from the 2d day of October, then last past, to reconvey the premises to Vanderhaise. At the time of the execution of these instruments, Hugues held a bond and mortgage from Vanderhaise upon the same premises to secure the same loan.

On the 15th of May, 1858, Vanderhaise, having purchased of Charles Kupner two other lots adjoining the premises conveyed as aforesaid to Hugues for \$350, and paid \$100 on account, Kupner conveyed the premises in fee to Hugues, upon his paying \$250, the balance of the purchase money.

It appears satisfactorily by the evidence, that as well the

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um of \$250 as the sum of \$3000, thus advanced by Hugues, were loans to Vanderhaise, and that the deeds from Vanderhaise and from Kupner to Hugues, though absolute upon their face, were intended as mortgages to secure the repayment of the said loans. This appears clearly from the testimony of Hugues himself, as well as from the other evidence in the cause. There is in truth no conflict in the evidence in regard to the material facts upon which the complainant's title to redeem is founded. The only real controversy in the cause relates to the amount due to the complainant, and to the allowances to which he is entitled in taking the account.

The defendant holds the legal title to the premises, and for a considerable period has been in possession, by his tenant, and in the receipt of the rents and profits.

The complainant is entitled to redeem and to have a reconveyance of the premises conveyed to the defendant, by way of mortgage as aforesaid, by the complainant and by Charles Kupner, upon the payment of the amount that shall be found due from the complainant to the defendant upon the loans which the premises were conveyed to secure.

It must be referred to a master to take an account of the amount due for principal and interest upon the said loans of \$3000 and \$260, made as aforesaid by the defendant to the complainant.

The master is also to take an account of the rents and profits of the said premises which have come to the hands of the defendant, or of any other person by his order or for his use, or which he without his wilful default might have received, and what shall be coming on account of the rents and profits shall be deducted from the amount found due upon the mortgage.

In taking the account, the master will allow—

1. For the amount advanced by the defendant to satisfy the judgment recovered by F. B. and N. C. Carpenter, for a lien claim upon the premises prior to the deeds

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made to the defendant—this payment being necessary for the protection of the estate.

2. Also for necessary repairs and lasting improvements.

3. Also for the costs of insurance and of advertising and other expenses necessarily or reasonably incurred in leasing the premises.

No allowance is to be made to the defendant for his services in renting or taking care of the property.

In taking the account, the master is authorized to make annual rests, or otherwise to charge the complainant with interest for advances made by the complainant, but not so as to charge the complainant with compound interest either upon the mortgage or upon the advances.

The evidence heretofore legally taken and filed in the cause may be used before the master, together with such further evidence as the master may deem necessary or desirable to ascertain the rights of the respective parties.

The evidence on the part of the complainant, filed 11th June, 1861, does not appear to have been taken and returned in compliance with the rules of the court, nor does it appear that said evidence was given under oath or subscribed by the witnesses. Before these depositions are received by the master as evidence, the officer before whom the depositions purport to have been taken should annex to each of the depositions a *jurat* properly signed.

The rent of the furniture or other personal property upon the mortgaged premises, not being within the original contract of the parties for the loan of the money, will not be included in the account of rents charged to the defendant; but the master will ascertain and report the value of the rents of the real estate, as distinguished from the rent of the furniture, unless by the written consent of both parties or their respective solicitors, or unless it shall be made to appear in evidence satisfactorily to the master that such allowance is in accordance with the contract of the parties subsequently entered into.

The question of costs and all further equity and directions are reserved till the coming in of the master's report.

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CAROLINE HOLCOMBE *vs.* THE EXECUTORS OF HOLCOMBE.

In case the will directs the executors to invest the residue of the personal estate, and the interest to accrue thereon "in good productive real estate at their discretion," and one of the executors, having funds in his hands, is prevented by the misconduct of his coexecutors from making the investment directed by the will, it is his duty to guard the estate from loss by applying, within a reasonable time, to the proper court for instructions.

Wurts, for executors.

J. F. Randolph, for legatees.

THE CHANCELLOR. By an interlocutory decree in the cause, made on the 15th of May, 1855, it was referred to one of the masters of the court to take an account, among other things—

1st. Of all the personal property of the testator at the time of his death, charging the executors with the same, as received by them respectively.

2d. Of all the personal property which has come to the hands of the executors respectively, or which by due diligence they might have received. 2 *Stockt.* 393.

The master reports that, in his opinion, it was the duty of the executors, in the exercise of due diligence, to collect the interest moneys in arrear, and invest the same for the benefit of the estate, and that the executors should be charged with interest on said moneys, after allowing them a reasonable time to collect and invest the same, and that, under the circumstances of this case, eighteen months was ample time for the executors to collect and invest said moneys. He accordingly charged each executor with all the interest accrued upon the sureties which came to their hands, respectively, with interest thereon, commencing one year and six months from the time it became due. The report in this particular was confirmed.

Asher Reading, one of the executors, has now exhi-

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bited his final account for settlement, which has been reported by the master. He claims a further allowance than that made by the master, on the ground that, by the principle adopted by the master in making his former report, he has been charged with several hundred dollars more interest than he actually received.

There are two decided objections to the allowance asked for.

1. It is in direct conflict with the principle adopted by the master and sanctioned by the Chancellor upon the former report. The principle was adopted, in the absence of materials for making the report in all respects accurate, as an approximation to the truth. In its application it would necessarily lead to an error upon one side or the other. If it had operated in favor of the executor, he would have had the benefit of it. As it operates against him, he cannot now complain. His remedy, if he had one, was by applying to have the report corrected before it was confirmed.

2. But it is conceded that it is not the principle adopted by the master in stating his account that constitutes the ground of complaint. The real question involved is whether the executor was bound to make an investment or not of the funds which came to his hands. If he was not, he is clearly not chargeable with interest. By the will, the executors were directed to invest the residue of his personal estate, with the interest that might accrue thereon, "in good productive real estate at their discretion." The executors could not agree as to the investments to be made in real estate, in consequence of which a large amount remained for some time in the hands of Reading, as executor, uninvested. On this ground it is insisted that inasmuch as he could not, in consequence of the misconduct of his coexecutors, make the investment as directed by the will, he was not bound to invest at all, and consequently is not chargeable with interest. It is admitted that he acted in good faith in not making the

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investment in real estate, and that his conduct in this particular has been sanctioned and approved. Nevertheless it was his duty as executor, in the exercise of due diligence in the management of the estate, as soon as it was ascertained that no investment could be made, as directed by the will, or within a reasonable time thereafter, to have applied to the court for directions in making the investment. He was clearly not bound to incur personal responsibility by making investments contrary to the directions of the testator; on the other hand, he was not justified, after it was ascertained that the directions of the testator could not be complied with, in suffering the estate to lie unemployed and unproductive. His clear duty was to apply to the proper court for directions touching the investment. This would have guarded the estate against unnecessary loss, and at the same time have shielded the executor from personal liability.

The relief asked for is denied.

CAROLINE HOLCOMBE vs. HOLCOMBE'S EXECUTORS.

Amount of commissions to be allowed guardian and receivers.

A trustee has no right to subject the trust fund unnecessarily to charges for counsel fees.

THE CHANCELLOR. On the 10th of May, 1860, the guardian settled his accounts up to that date. He then claimed a very liberal allowance for his services. Upon representations made to the court that the circumstances were peculiar, and that the claim was acquiesced in by all the parties interested, the claim was allowed. He now claims one hundred dollars additional commissions, equal to about twelve per cent. on the amount received and paid out since the former settlement. It is manifest, on the face of the accounts, that there is no ground for this

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claim and no justification for its allowance. The guardian has been put to no trouble, encountered no difficulty, incurred no risk. He has simply received (\$850) eight hundred and fifty dollars from the receivers of the estate, and paid it over as received to his ward. He has not even been at the trouble of disbursing it. Twenty-five dollars are allowed as commissions. This is nearly three per cent. upon the total amount of disbursements, including the balance from last settlement, upon which commissions have already been allowed. Two per cent. is the highest rate allowed by law to commissioners, sheriffs, and other officers for receiving and paying over the proceeds of sales of real estate. It is the highest rate allowed by law in New York to executors.

While this might not be an adequate compensation for the ordinary duties of guardian, it affords a fair standard by which to gauge the measure of compensation to which the guardian in this case is entitled for services performed during the past year.

There is also a charge in the account for cash paid attorney \$20.50. On the last settlement, counsel and attorney's fees were allowed up to the date of the settlement. There is nothing in the account since to require or justify the services of counsel or attorney. A trustee has no right to subject the trust fund unnecessarily to charges for counsel and attorney's fees. Where the services of counsel are required, some discretion must be allowed the trustee as to the amount of compensation; but the mere fact that a trustee has paid fees to an attorney or counsel will not of itself be a warrant for the allowance, especially where it is obvious that there could be no occasion for their services.

The report must be corrected accordingly.

SAME CASE.—In matters of receiver's accounts.

The only matter left open upon the master's report is the amount of commissions to which the receivers are entitled.

They were appointed, by a decree of this court, on the 30th of October, 1857, in the stead of two of the executors of John Holcombe, deceased, who were removed from office. They were appointed as receivers and co-trustees, with the other executor, under the will of the testator, and entered upon the duties of their office on the 9th November, 1857.

Their first account was exhibited on the 27th December, 1858, and included their claim for services up to that date.

On the 26th of June, 1860, they exhibited their second account, and asked a further allowance for their services at the rate of \$500 per annum, each. The consideration of the subject of such further allowance was reserved until the final settlement of the receivers' accounts. They have now exhibited their final account, and ask an allowance of commissions at the same rate as suggested in the last report.

The subject of the proper allowance to the receivers was reserved, on the former settlement of the accounts, on the ground that the legatee of the estate, and the only party immediately interested in the settlement of the accounts, was then a minor over twenty years of age, and it was desired that she should be heard personally or by counsel in regard to the allowance after she attained her majority. In this hope the court has been disappointed. The subject has been referred to the court for its decision without a suggestion from counsel or any further aid or assistance that can be derived from the accounts themselves.

The high character of the receivers, and the acknow-

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ledged fidelity with which they have executed their trust, have disposed the court to make a just and full allowance for their services.

During the first year of the services of the receivers their duties were delicate, arduous, and responsible. They asked, on these and other grounds, extraordinary compensation. The allowance was made to the full extent of their request. The grounds of the allowance are not stated in the order. It was obviously made under peculiar circumstances, and was certainly characterized by liberality.

Since that settlement, there is nothing in the accounts indicating anything peculiar in the duties or services of the receivers. The protracted and embarrassing litigation in which the estate had been involved had been brought to a close. Nothing remained to be done but to take charge of the trust estate and to dispose of the income under the provisions of the will or in pursuance of the order of the court. They are precisely the duties which devolve upon trustees and executors under a will of real and personal estate wherever the property is placed under the charge of executors. The receivers were in fact appointed in the place of executors named in the will.

On their first settlement there was a balance in their hands of \$648.12. They have since received from all sources \$17,643.83, making an aggregate of \$18,291.95. They have disbursed \$14,709.49, including their own commissions, on the first settlement. If these be deducted, their entire disbursements are but \$12,442.85. The sum claimed is in the form of a yearly allowance to each of the receivers. It amounts to over thirteen per cent. upon the total receipts. Now, as has been said, there is nothing to distinguish the services of these receivers from those of other testamentary trustees. Had they been appointed by the will of the testator, instead of by this court, the total amount of commissions to which

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they would have been entitled under the act of 1855, *Nix. Dig.* 562, § 57, would have been but \$582.87, *viz.*

On \$1000, 7 per cent.,	\$70.00
“ 4000, 4 “	160.00
“ 5000, 3 “	150.00
“ 7643.83, 2 per cent.,	152.87
	<hr/>
	\$582.87

It is conceded that the receivers were not appointed under this act, nor is this court controlled in making the allowance by its terms: still it affords a criterion by which, at least in the judgment of the legislature, the value of these services may be estimated.

By the law of New York, receivers appointed in chancery upon the dissolution of a corporation are entitled (over their disbursements) to such commissions as the court may allow, not exceeding the sum allowed by law to executors or administrators. 2 *Rev. St.* 467, § 76. The fees allowed to executors and administrators are much less than those allowed by our act of 1855. *Edwards on Receivers* 176.

This is a lower rate of compensation than has been usually allowed to executors and administrators in this state or to receivers in this court. I know of no fairer or more equitable mode of making compensation to these receivers than to deal with them as trustees under a will or as executors having real and personal estate in charge. Their duties and their responsibilities are identical. They are in fact standing in the shoes of the executors. The average allowance for many years, so far as my knowledge extends, upon estates exceeding \$5000 has been about five per cent. In this case an additional allowance is made to the receivers of \$1200. This is something over six per cent. upon the total amount of funds in the hands of the receivers since their first settlement. The allowance is made thus large in view not only of the nature of their

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duties but of the fidelity and diligence with which the trust has been executed. It must be understood that this allowance includes a compensation for all their services until the property shall be transferred pursuant to the order of the court.

THE WATER COMMISSIONERS OF JERSEY CITY vs. THE
MAYOR AND COMMON COUNCIL OF THE CITY OF HUDSON.

A water company, authorized by legislative enactment to use the soil under the public roads for the purpose of constructing their works, having laid their pipes across the street of a city, will be compelled to lower them so as to conform to a new grade established by municipal authority. No public right can be taken away by mere inference or legal construction—it can only be by express grant. Equity will not interfere by injunction to redress public nuisances where the object sought can be attained in the ordinary tribunals.

McClelland and Zabriskie, for complainants.

Vroom and Scudder, for defendants.

THE CHANCELLOR. By an act of the legislature, approved on the 25th of March, 1852, entitled, "An act to authorize the construction of works for supplying Jersey City and places adjacent with pure and wholesome water," the mayor and common council of Jersey City were authorized to take and convey into Jersey City, and places adjacent thereto, such portion of the water of the Passaic river, flowing between the villages of Acquackanonk and Belleville, as might be required to furnish the inhabitants with a supply of pure and wholesome water. All authority granted by the act, it is directed, shall be exercised by and through a board of commissioners. The commissioners are authorized to take and hold any lands

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or other real estate necessary for the construction of any canals, aqueducts, reservoirs, or other works for conveying or containing water, or for the erection of any buildings or machinery, or for laying any pipes or conduits for conveying water, and to do any other act necessary for accomplishing the purposes contemplated by the act. And by the 6th section it is enacted, "that the commissioners in behalf of the mayor and common council of Jersey City shall have the right to use the ground or soil under any roads, railroad, highway, street, lane, alley, or court within this state for the purpose of constructing the works contemplated by this act, on condition that they shall cause the surface of such road, railroad, highway, &c., to be restored to its original state, and all damages done thereto to be repaired, and all damages to any company, by any interruption of travel while the work is constructing, to be repaid to them."

In pursuance of the powers thus conferred, the water commissioners of Jersey City caused the necessary works to be constructed, and by means thereof are now supplying the inhabitants of Jersey City and Hoboken with water. Among other works, they caused to be constructed in the township of North Bergen, which is now embraced within the limits of the City of Hudson, a reservoir and pipes leading from thence through a street heretofore dedicated to the public use, and now known as Madison avenue. The pipes were laid in the year 1854, in compliance with the directions of the act, three feet below the surface of the soil, and are now used for the purpose of conducting the water from the reservoir to Jersey City and Hoboken.

The bill charges that the municipal authorities of Hudson City, which was incorporated on the 11th of April, 1855, and certain other persons pretending to act by virtue of authority given them by said city, have recently excavated the soil on each side of the pipes at the junction of Madison avenue and Montgomery avenue, in Hudson

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City, and threaten to blast the rocks near and under the pipes, and that, if permitted to do so, the pipes will be destroyed, the supply of water cut off, and irreparable injury done to the works of the complainants; that by reason of the excavation already made, the pipes are placed in a condition exceedingly unsafe and liable to injury. The complainants ask an injunction to restrain the corporation of Hudson City and their agents from excavating around or under the pipes of the complainants, or from blasting rocks within sixty feet of the same.

The material charges of the bill are admitted by the answer, except so far as relates to a purpose on the part of the defendants to injure or destroy the works of the complainants, which is fully and expressly denied. The answer alleges that the work which forms the subject of complaint, and which the injunction is designed to arrest, consists in the grading of Montgomery avenue, a public street in Hudson City, by the municipal authority of said city, by virtue of powers vested in them for that purpose; that the grade of the street, as established at the intersection of Montgomery and Madison avenues, requires that the pipes of the complainants should be placed at a lower level, and that, if they remain in their present position, they will create an obstruction and nuisance in the highway.

The case thus presented is briefly this. The water commissioners of Jersey City, in the construction of their water works, laid their main pipe from the reservoir to the city through Madison avenue, now one of the public streets of Hudson City. The work was done in pursuance of express legislative authority for that purpose. Hudson City was incorporated since the water works were constructed. The city authorities, in grading their streets in pursuance of powers conferred by the charter, have so fixed the grade of Montgomery avenue, where it crosses Madison avenue, that a portion of the pipe is above the level of the street. The grade must either be abandoned

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or the pipe lowered. The pipe, where it crosses Montgomery avenue, is laid on solid rock, and the change of level will involve serious expense. By whom must this expense be borne if the level of the pipes must be changed?

It is a principle, too clear to admit of discussion, that the legislative grant of powers and privileges to the water commissioners of Jersey City can be in no wise impaired or annulled by the subsequent incorporation of Hudson City or the grant of conflicting powers. If the grants are so conflicting that both cannot be exercised the prior grant must prevail. If the grade adopted by Hudson City for one of its streets be such as necessarily to destroy works erected under the sanction of the legislature the grade must be abandoned. If both grants may be exercised, each party must so use its rights as not to interfere with the exercise of the rights of the other.

What, then, is the right conferred by the legislature upon the complainants? It is, in the language of the act, "to use the ground or soil under any road, railroad, highway, street, lane, alley, or court within this state for the purpose of constructing the works contemplated by the act." It is obvious that the right granted is to be exercised in subordination to the public right of way. It was not intended to impair the public easement or the control of the public authorities over it. The grant is made on the express condition that they should cause the surface of the highway or street to be restored to its original state, and that all damage done thereto should be repaired. It legalizes the breaking up of the surface of the highway and the partial and temporary obstruction of public travel for the necessary construction, alteration, and repair of the water works. To this extent it relieves the commissioners from all liability to the public or individuals for trespass or nuisance; but beyond this it confers no right as against the public, much less was it designed to interfere with the right of private property in the soil under the highway. The public have an ease-

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ment in the soil—a right of way upon its surface. The commissioners, by consent of the landholders, express or implied, have also an easement—the right of laying pipes under the surface. The legislature concede to the owners of the latter easement, for the purpose of its advantageous exercise, limited and temporary interference with the public easement. This is the full extent of the legislative grant.

But it is urged that the right of the commissioners to have their water pipes under the streets is *property* which cannot be taken from them except in the mode pointed out by the constitution, viz. by making compensation. Let it be granted that the right to lay the pipes under the streets, and to keep them there when laid, is a right of property which cannot be constitutionally invaded without compensation, the question still recurs, what is the limit of that right. If the grant to the commissioners had been to place and keep their pipes three feet under the surface of the soil, as it existed at the time of the construction of the works, there might be force in the argument. But that is not in the terms of the grant. All that is granted is a right to place and keep the pipes under the highway. The owner of the soil has a common law right to the use and enjoyment of the soil under the highway. He may open a mine, construct vaults or chambers, erect machinery, lay water pipes, or exercise any other right of ownership in the soil not inconsistent with the public easement. But all these rights are held and must be enjoyed in subordination to the public right of way, including the right of construction, alteration, and repair. It cannot be successfully maintained that a mere easement in the land, though enjoyed and exercised by legislative sanction, can be a more sacred right of property in the eye of the constitution than the right of the landholder himself. It must be held (and such must be the construction of the legislative grant) in subordination to the public easement.

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No public right can be taken away by mere inference or legal construction. It can only be by express grant. The legislature have not in express terms, by their grant to the commissioners, deprived the public authorities of their control over the highway in which the water pipes should be laid, nor is it by any means a necessary inference from the grant.

The authorities of Hudson City have an unquestioned right, in the exercise of their municipal powers, to grade the street in question in the manner proposed. If the work is executed, the pipes are left not where the legislature authorized them to be, below the surface of the street, but above it. They become a public nuisance, and must be removed. But by whom? Clearly at the expense of the water commissioners; and if regard be had to economy or safety, it must be under their control and the inspection of their engineer or superintendent. If they refuse or neglect to interfere, it will then be the right and the duty of the authorities to remove them, doing no unnecessary injury to the property of the complainants. It is not seriously denied that the authorities of Hudson City have the right of grading the street; but it is urged that the labor and expense of lowering the pipes must be borne by them. This is clearly a mistake, as will be obvious from a simple consideration. If the land under the pipes consisted of soil which might be removed without injury to the pipes, the grade of the street might be completed without any disturbance of or immediate injury to the property of the complainants. But the pipes have now become an obstruction in the highway and a public nuisance. They are not where the act requires that they should be placed, beneath the surface of the soil. They are moreover exposed to injury and destruction from frost and from the effects of public travel. Is it not clearly the duty of the commissioners to abate the nuisance, and protect their property by removing it out of the highway?

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It is admitted that the pipes may be lowered without injury to the works. This has already been done by the complainants at another point within the City of Hudson under similar circumstances. The grading of the street does not necessarily involve either the destruction of or irreparable injury to the complainants' works. It is a mere question of time and expense.

The court, in deciding this question, cannot assume that the authorities of Hudson City will, by themselves or their agents, so execute the work as to destroy or unnecessarily to endanger the property of the commissioners. It would be wrong to act upon the assumption that they will destroy or unnecessarily injure a work essential to the comfort, health, and safety of two cities, including a population of nearly 50,000 inhabitants. Such purpose is expressly denied by the defendants' answer. If no higher considerations controlled the defendants, as regard to their own interests, it would seem, must do so. All wilful or malicious diversion of the water from the complainants' works, or destruction or injury of the aqueducts, pipes, or machinery used for procuring or distributing the water, subjects the perpetrators, their aiders or abettors, not only to the payment of the damages, but to indictment and punishment by fine and imprisonment. (*Pamph. L. 1852, § 21*). Though the jurisdiction of courts of equity to redress public nuisances by injunction is of ancient date, and seems clearly established, yet, as a general rule, equity will not interfere where the object sought can be as well attained in the ordinary tribunals. *Attorney General v. New Jersey Railroad and Transportation Company, 2 Green's Ch. R. 136, 139, note.*

The difficulty between the parties has obviously originated in a question of right, which it was proper should be settled before either party had compromised the interests of their constituents. The delay of the complainants to remove their pipes must be attributed to this motive. The right being decided, reasonable time should be

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afforded them to remove their property before the defendants proceed with the work of grading the street.

The injunction is denied, and the rule to show cause discharged with costs. The bill will be retained, and if, contrary to the anticipations of the court, any attempt should be made or threatened on the part of the defendants to imperil the safety of the works (the complainants using due diligence to effect the necessary alteration of the level of the pipes) a renewal of the motion for an injunction will be entertained. The importance and necessity of the complainants' works are such to the well being of a large community that the authority of the court should be exercised to the fullest extent for their preservation.

The opinion is limited exclusively to the case made by the bill, *viz.* the interference by the defendants with the pipes of the complainants laid under a public street by legislative authority. An interference with the property of the complainants in land to which they have acquired title, occupied by their reservoirs or aqueducts, presents other and very different questions, in no wise affected by the present decision.

THE HOBOKEN BUILDING ASSOCIATION vs. MARTIN and wife.

A contract is not void because the corporation with which it is made is misnamed therein.

Where the complainant, being a corporation, sues by a wrong name, the bill may be amended, in this respect, at the hearing.

The stockholders compose the corporation, and a mere failure to elect officers at the time designated will not work a dissolution.

The complainants, a building association, received from the defendant his bond and mortgage, reciting that he was a shareholder in said building association, and had agreed to accept, and had received from said corporation \$400 at the date of the bond, "upon and for the redemption of

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number 69, being the sum lent or offered to be received by him therefor." The condition of the bond was as follows: "Now, if the said A. W. M., &c., shall pay to the said H. B. Association, number one, upon said share, the sum of \$7, on the third Monday of each month thereafter, for the period of ten years from the date hereof, or until the surplus assets of said corporation shall be sufficient, over and above all its debts and liabilities, to pay on each unredeemed share, to the holder thereof, the sum of \$8," &c. *Held*—

- 1st. That the failure of other shareholders to pay their monthly dues afforded no defence to a suit for the foreclosure of said mortgage.
- 2d. That the contract was in accordance with the charter of the corporation, and was not usurious.
- 3d. That an agreement made by all the parties in interest that the affairs of the company should be wound up, and that the owners of the unredeemed shares should receive the sums they had advanced with interest, and that the owners of the redeemed shares who had given mortgages for the price of redemption should be discharged upon paying the amount of their mortgages with interest was valid, and should be enforced.

Zabriskie, for complainants.

Lyons and Weart, for defendants.

THE CHANCELLOR. The complainants are a corporation, organized under the provisions of the "act to encourage the establishment of mutual loan and building associations," approved February 28th, 1849, (*Nix. Dig.* 84). The bill is filed to foreclose a mortgage given by the defendant, a member of the association, to secure the payment of a bond, made pursuant to the provisions of the constitution and by-laws of the association.

The bond recites that the obligor is a shareholder in said building association, and has agreed to accept, and has received from said corporation, the sum of four hundred dollars, at the date of the bond, "upon and for the redemption of number 69, being the sum lent or offered to be received by him therefor." The condition of the bond is as follows: "Now if the said Adolphe W. Martin, his heirs, executors, administrators, or assigns, shall pay to the said the Hoboken Building Association, number one, upon said share, the sum of seven dollars on the

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third Monday of each month thereafter for the period of ten years from the date hereof or until the surplus assets of said corporation shall be sufficient, over and above all its debts and liabilities, to pay on each unredeemed share, to the holder thereof, the sum of eight hundred dollars; and if the said Adolphe W. Martin shall also pay to the said corporation all fines and forfeitures that may be imposed upon or suffered by him under and by virtue of the constitution, by-laws, and regulations of the said the Hoboken Building Association, number one, then the above obligation to be void."

The execution of the bond and mortgage are admitted.

The first ground of defence is, that the complainants have sued by a wrong corporate name. The corporate name is erroneously stated, both in the bond and in the complainants' bill. But there is no question as to the identity of the person, nor that the complainants are the obligees in the bond. The defendant admits it, both in his answer and in his evidence. If the name given sufficiently designates the corporation the contract cannot be avoided for the misnomer. 1 Penn. 115, 501; *Inhabitants of Upper Alloways Creek v. String*, 5 Halst. 323; *Ang. and Ames on Corp.* § 647.

The objection to the bill is not raised by plea. The bill may be amended by inserting the true name of the corporation and introducing the proper averment, in pursuance of the motion made at the hearing.

The second ground of the defence is, that the corporation is dissolved, no officers having been duly elected according to the requirements of the constitution. But the stockholders compose the corporation, and a mere failure to elect officers at the time designated will not work a dissolution. *Ang. & Ames on Corp.* § 144, 771.

Nor will this court, in an action by the corporation against its debtor, look into the regularity or validity of the election of the corporate officers. That question cannot be thus tried collaterally. Where the fact of indebted-

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edness is established, a very clear case should be made out to enable the debtor to escape liability on the ground that the corporation has ceased to exist.

The third ground of defence is, that the defendant is relieved from liability by reason of the refusal of other members of the corporation to pay their monthly dues. This defence rests upon the idea that, by the terms of the bond, the defendant is to continue to pay his monthly instalments until the surplus assets, after discharging all liabilities, are sufficient to pay to the holder of each unredeemed share the sum of \$800, and that the failure of others to contribute necessarily postpones the accomplishment of that object, and thus unlawfully increases the extent of the defendant's liability. But the defendant's obligation to pay is absolute. By the terms of his bond, he assumes the hazard of all losses sustained by the corporation, either by fraud, accident, or the defalcation of its members. Every shareholder must of necessity incur that hazard. He cannot escape the hazard, nor can his liability to loss be diminished by entering into an obligation and giving security for the payment of his dues to the corporation.

The fourth ground of defence is, that the contract is usurious. The defendant, by the terms of his contract, engaged to pay for the use of the money received from the association far more than the legal rate of interest. But the contract was in accordance with the constitution of the association of which the defendant was a member. The money was not advanced by way of loan, but in redemption of the defendant's share, a mode of investment provided for by the constitution of the association authorized by the act of incorporation. It is declared by the statute that no premium given for priority of loan or acquisition of a building, or discount given on the redemption of shares, shall be deemed to be usurious. All contracts made under the authority of the statute are exempted from the operations of the statute against usury.

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There is nothing in the objection, that the defendant not receive the entire sum agreed to be paid to him for the redemption of his share, and for which the bond was given. The evidence shows that the usual deduction of five dollars was made to meet the expenses of making the records and preparing the papers. But if the facts were otherwise, and the money had been wrongfully withheld in violation of the agreement of the parties, no additional premium for the advance of the money, could not have tainted the obligation with usury. It is not a part of the contract upon which the money was advanced. *Executors of Howell v. Auten*, 1 *Green's Ch.* 5.

The last ground of defence is, that the affairs of the association are being wound up under circumstances which violate the contract of the defendant with the association and relieve him from liabilities upon his bond.

The association went into operation in the year 1852. Its constitution, the capital was derived from monthly contributions, and was invested in the redemption of the shares of members. The shares were not to exceed one hundred and fifty, and were to be extinguished or redeemed in ten years from the time the corporation was organized. The shares were redeemed at auction—the member accepting the least sum for his share being entitled to have his share redeemed and to receive its equivalent from the funds of the association. But though the share of a member was redeemed, his membership did not thereupon cease. But, by way of equalizing the advantage which he was supposed to have obtained by the redemption of his share, and the consequent use of a portion of the fund to compensate the members whose shares were not redeemed, he was to pay a higher rate of contribution. All the shares were redeemed or satisfied by the redemption of \$800 each. The redeemed shares paid a monthly contribution of seven dollars, or eighty-four dollars per annum. The unredeemed shares paid a monthly contri-

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bution of three dollars, or thirty-six dollars per annum. In 1855, there were forty-nine redeemed shares, each of which were bound to pay eighty-four dollars per annum. Their owners appear to have discovered that they were paying an extraordinary premium, or rate of interest, for their money. It was obviously their interest that the arrangement should be terminated, and as obviously the interest of the owners of the unredeemed shares that it should be continued. This gave rise to difficulty. The owners of the redeemed shares naturally felt that the operation of the contract was oppressive. It is in evidence that all or most of them, including the defendant, refused or neglected to pay their monthly contributions. The owners of many of the unredeemed shares thereupon refused to pay their monthly dues. An arrangement was thereupon entered into, by which it was agreed that the affairs of the institution should be wound up. The owners of the unredeemed shares were to receive in satisfaction of their claims the sums they had respectively advanced with interest. The owners of the redeemed shares who had given mortgages for the price of redemption were to be discharged from their obligations upon paying the amount of their mortgages with interest, being the sum which they had actually received from the association, less the amount of their monthly contributions. The arrangement was perfectly equitable, and was favorable to the mortgagors. The testimony is conflicting, but the decided weight of the evidence is, that the arrangement received the sanction of the corporation. However this may be, the proof is decided that it was assented to and approved by the defendant. Under this arrangement, forty-four of the forty-nine unredeemed shareholders have been settled with and discharged from their mortgages. The defendant now insists that he was willing to pay his contributions, that the winding up of the affairs of the association was illegal, and that he is conse-

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quently released from the obligation of his bond and mortgage.

The arrangement is either obligatory or inoperative and void. If it is inoperative, the defendant is left to the terms of his contract. The illegal conduct of the officers of the corporation will not relieve him from his obligation. By the constitution of the association and the terms of the mortgage deed he would be entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, its probable duration to be ascertained by calculation, and the future payments to be treated as if immediately due. *Mosley v. Baker*, 6 Hare 87; *S. C.* 27 *Eng. Law and Eq.* 512; *Fleming v. Telf.* *Ibid.* 490; *Farmer v. Smith*, 4 Hurls. & Nor. 196; *Seagrave v. Pope*, 1 *De Gex, MacN. & Gor.* 783; *S. C.* 15 *Eng. Law & Eq.* 477.

The same principle as applied to decrees of foreclosure was adopted by the master, and sanctioned by the Chancellor, in *Van Vorst v. Horsley*, to be found in Book of *Enrolled Decrees*, E. 4, page 626. It was also recognised and approved by the Chancellor in *Savings Association v. Vanderveer*, 3 *Stockt.* 387, although in that case the account of the monthly payments due from the mortgagor was directed to be taken only to the period of taking the account.

Independent of the arrangement for winding up the affairs of the association, the defendant would be bound to account according to the condition of his bond until the time fixed for the dissolution of the corporation. It is obvious that all the shares could not have been redeemed before that period. But the defendant is equitably entitled to the benefit of that arrangement, although he subsequently repudiated and refused to perform it. The complainants cannot object to a decree upon this basis, for they have acted upon it, and are proceeding to wind up the affairs of the corporation accordingly. It is in fact the only satisfactory and equitable method of dis-

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posing of the question. It is obvious, from the evidence in the cause and from the statements of the defendant himself upon the hearing, that the whole controversy in this court has arisen from a trifling difference between the parties as to the sum actually due to the complainants upon the basis of the settlement. The whole difference was less than twenty dollars. It is exceedingly to be regretted that so much expense should have been incurred for so trifling an amount.

The complainants are entitled to the sum of \$221.78, the amount reported by the cashier to be due from the defendant upon the basis of the settlement on the first of September, 1856, with interest from that date. No reference to a master is necessary. The amount can be agreed upon, or readily ascertained by calculation, and a decree will be made accordingly.

VANSCIVER vs. BRYAN and others.

A judgment without the issuing of an execution operates as a lien from the time of its entry on the lands of the defendant, and a subsequent conveyance or mortgage executed by the defendant will not defeat such lien. Evidence relative to matters not stated in the pleading, nor fairly within its general allegations, is impertinent, and cannot be made the foundation of a decree.

Merritt, for Asay, defendant.

Ten Eyck, for Morgan, defendant.

THE CHANCELLOR. There is no dispute in regard to the complainant's mortgage, which constitutes the first encumbrance on the mortgaged premises. The whole controversy is a question of priority between two subsequent encumbrancers, whose claims are stated in the bill. Wil-

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hiam Morgan recovered a judgment against Bryan, the mortgagor, in the Burlington Pleas, on the 24th of July, 1858, upon which judgment execution was issued on the 21st of September following. The execution was not levied upon the mortgaged premises, but upon other lands of the defendant in execution. On the 29th of July, 1858, five days after the entry of the judgment, Bryan, the mortgagor, executed to Abraham H. Asay a mortgage upon two equal undivided third parts of the premises included in the complainant's mortgage. On the same day, Bryan gave to Asay a deed in fee for the remaining third part of said premises. The mortgage given to Asay was not recorded until the 9th of October, 1858. His deed was not recorded until the 30th of April, 1859, when a second mortgage between the same parties upon the undivided two thirds was also recorded.

Morgan, by his answer, insists that his judgment, being prior to the mortgage and conveyance to Asay, is entitled to priority. Asay, by his answer, admits the judgment to Morgan, but insists that he is entitled to priority.

1st. Because his mortgage was executed and recorded prior to the issue of execution upon Morgan's judgment.

2d. Because the execution was never levied upon the premises included in the conveyance and mortgage from Bryan to him.

The judgment, from the time of its entry, operates as a lien upon the lands of the defendant. *Nix. Dig.* 722, § 2. The only exception is in favor of subsequent judgment and execution creditors, who have a priority over judgments upon which no executions have been issued. The reason for this exception is clearly stated in the statute. *Nix. Dig.* 724, § 9. The fact that no execution was issued, or, being issued, that no levy was made, does not affect the lien of the judgment or its priority over subsequent deeds and mortgages.

The ground principally relied upon at the hearing in support of Asay's claim to priority over the prior judg-

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ment of Morgan was, that the title to the one equal undivided third part of the premises included by the complainant's mortgage, and which were subsequently conveyed to Asay, were in fact owned by him prior to the entry of the judgment. Though the legal title was in Bryan, it is alleged that he paid one equal third of the purchase money, and that Morgan had notice of this equitable claim prior to the entry of his judgment. This fact, if properly put in issue by the pleadings and sustained by the evidence, would relieve Asay's share of the land from the encumbrance of the judgment. But the fact of the existence of this equitable title is not relied on or adverted to in Asay's answer. On the contrary, he insists that he is entitled to priority over Morgan's judgment because no execution was issued and levied upon the premises. Evidence relative to matters not stated in the pleading, nor fairly within its general allegation, is impertinent, and cannot be made the foundation of a decree. A bill to annul a bond for want of consideration will not be sustained by proof that the contract was immoral. Nor will a bill filed to set aside a sale on the ground of fraud practised by the defendant be sustained by proof of a relationship between the parties, from which fraud might be inferred where that fact is not stated in the bill. *Whaley v. Norton*, 1 Vern. 484; *Williams v. Llewellyn*, 2 Younge & J. 68.

The rule is well established, that the court cannot notice matter, however clearly proved, of which there is no allegation in the pleadings. *Gresley's Ev.* 161.

The rule should be strictly enforced wherever the matter offered in evidence is not fairly within the general allegations of the bill, and where its production will operate as a surprise upon the adverse party. If the matters stated by Asay in his answer had been contained in a bill of complaint, he clearly could not have shown his equitable title in evidence. Morgan would have been entitled to the benefit of an answer upon that part of the case. A

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defendant who seeks by his answer to impeach the prior right of his codefendant can stand in no better position than if he were complainant seeking the same advantage by his bill. If, therefore, the equitable right of Asay were fully proved he could not have the benefit of it under the pleadings in the cause.

But, aside from this technical difficulty, his equitable title is not satisfactorily proved. The proof depends almost exclusively upon the testimony of Asay himself. The support it derives from the evidence of the witness on the part of Morgan is not sufficient to sustain a decree. A party who comes into court seeking relief on equitable ground against the legal rights of another should establish his equity by clear and irrefragable proof. To permit the legal priority of a judgment or mortgage to be overcome by the parol evidence of a subsequent encumbrancer, unsupported by other clear testimony, would be destructive of the security of all legal encumbrances.

The master, in taking the account and stating the order of encumbrances, must give priority to Morgan's judgment over the mortgage of Asay. The judgment is also a lien on the lands subsequently conveyed by Bryan to Asay. The levy of the execution of Morgan's judgment on the real estate of the defendant in execution is not a legal satisfaction of the judgment. The evidence shows that the land levied upon is not sufficient to satisfy the judgment. It also appears that there is a subsequent encumbrance upon the land levied on. The plaintiff in execution cannot, therefore, be required to apply first the proceeds of the sale of the land levied on in satisfaction of his judgment in aid of Asay's encumbrances upon other property subject to Morgan's judgment. Assets are never marshalled to the prejudice of subsequent encumbrancers. The premises must be sold, and the proceeds of the sale applied in satisfaction of the encumbrances, in conformity with these directions. The matter is referred to a master to take an account, and report accordingly.

Oram v. Dennison.

ORAM vs. DENNISON.

Where complainant's proceedings are regular, the decree is opened at the instance of the defendant on payment of costs.

But where a sole defendant resides out of the state, and no foreign publication is ordered or notice given to the defendant, costs on opening the decree ordered to abide the event of the suit.

Bill for relief against a deed to the defendant, alleged to have been fraudulently obtained. Decree *pro confesso* and order for proofs taken 25th March, 1861. By the sheriff's return, it appears that the defendant resided in the city of New York. The order of publication was published, in compliance with its terms, in a newspaper published at Morristown, in this state.

Mills, on behalf of the defendant, applied to set aside the decree *pro confesso* without payment of costs; that the defendant be admitted to defend the suit, and that he have thirty days' time to answer. In support of the motion, he read an affidavit of the defendant (a copy of which was served on the complainant's solicitor, with notice of the motion,) stating that the defendant resides and transacts business in the city of New York; that no process of subpoena was served upon him; that he never saw the order of publication, and that he had no knowledge of the existence of the suit until the 17th day of July last, and first learned that a decree had been entered against him on the — day of July.

THE CHANCELLOR. The decree must be set aside, the defendant admitted to defend, and thirty days allowed to plead, answer, or demur. The only question relates to the allowance of costs. Where the complainant's proceedings are strictly regular, the rule upon opening the decree is granted upon the payment of costs. The order

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of publication in this cause is not in accordance with the rule of practice, as stated in *Wetmore v. Dyer*, 1 *Green's Ch. R.* 386, viz. that where the defendants all reside out of the state foreign publication is required. The rule is not uniformly enforced in practice, but is founded in reason, and in the present case there was peculiar propriety in adopting it. The petitioner is the sole defendant, resident and doing business in the city of New York. Personal service might readily have been effected. A publication of the order in the city of New York would most probably have met the defendant's notice. There was no probability that the publication in a country paper which the defendant did not take would be seen or heard of by him. It is true the order of publication was signed in its present form by the Chancellor. But such formal orders, it is well known, are usually signed as drawn by the complainant's solicitor where no question is raised as to their legality, and are always taken at the peril of the complainant. It is proper, under the circumstances, that the costs of the decree *pro confesso* should abide the event of the suit.

Order accordingly.

SEYMOUR and SAGE vs. HENRY M. LEWIS and others.

Where the owner of a spring lot, and of a paper mill on another tract, by an artificial arrangement conveys the water to the mill, and then sells the spring lot, the purchaser takes it subject to the burthen.

The principle is, that where the owner of two tenements sells one of them, the purchaser takes the tenement, or portion sold, with all the benefits and burthens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.

Richey and *Beasley*, for complainants.

Wilson, for defendants.

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THE CHANCELLOR. In the year 1857, James Gaunt was seized in fee and possessed of two lots or parcels of land and real estate in the city of Trenton. The first consisted of an extensive and valuable paper mill, with the water privileges and appurtenances, situate on the raceway of the Trenton Water Power Company, and known as the Delaware mill. The second consisted of a lot of land on the south side of Front street, extending in the rear to Washington street, upon which were erected two brick dwellings. Upon the latter lot there was a valuable spring, which furnished a copious supply of water. The water of the spring had been, by a previous owner of the two lots, as early as 1845, (and probably as early as 1841) diverted, by means of pipes or conduits, from its natural and accustomed channel over the land to the Assanpink creek, to the paper mill upon the other lot of Gaunt, and was there used in the manufacture of paper. The water continued to be thus diverted and used by all the successive proprietors of the two lots down to the year 1857. It was so used and enjoyed by James Gaunt during his ownership and occupancy of the two lots. During that year Gaunt became insolvent. By a deed, dated on the 31st of August, 1857, he conveyed the two houses and lot on Front street to his father-in-law, Griffen Green. On the 26th of September, 1857, he leased the paper mill to the complainants, Seymour and Sage, for the term of two years, and on the 28th of the same month he executed to them a mortgage upon the paper mill to secure the payment of \$40,000 with interest.

On the 2d of November, 1857, a writ of attachment issued out of the Supreme Court, at the suit of Hiram A. Briggs and Russell Briggs, to the sheriff of the county of Mercer, against the real and personal estate of James Gaunt and James T. Derrickson, as nonresident debtors, by virtue of which the sheriff attached, inventoried, and appraised the paper mill alone. The lot on Front street was not included in the inventory.

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On the 11th of November, 1857, a writ of attachment issued out of the Supreme Court to the sheriff of the county of Mercer, at the suit of Henry M. Lewis, against the real and personal estate of James Gaunt, as a nonresident debtor, by virtue of which the sheriff attached, inventoried, and appraised both the paper mill and the houses and lot on Front street. This latter attachment is still pending undisposed of.

In the attachment issued at the suit of Briggs against Gaunt and Derrickson judgment was recovered, upon the report of auditors, in favor of divers creditors, to an amount exceeding \$85,000, including a claim of the complainants, Seymour and Sage, against Gaunt alone, to the amount of \$50,965.75, and the auditors were directed to make sale of the property attached. At a sale made by the auditors, on the 29th day of July, 1859, Seymour, one of the complainants, for the benefit of the firm, became the purchaser of the paper mill, with the privilege of diverting the water from the spring to the paper mill, and also of the houses and lot on Front street. The property was conveyed to him, accordingly, by deed dated on the 9th of September, 1859. The complainants, by virtue of their lease and of the title thus acquired by them, continued in possession and enjoyment of the paper mill and of the spring of water down to the time of filing their bill.

Lewis claims title to the lot on Front street, and also to the spring of water, with the right of diverting it from the complainants' mill by virtue of a deed from Griffen Green, bearing date on the 5th of May, 1859.

The bill prays that the deed from Gaunt to Griffen Green, and from Green to Lewis, may be declared to be fraudulent and void, or that they shall stand as securities for the sums actually advanced to Gaunt as a consideration for the conveyance; that Lewis may be enjoined from using the title as a defence to an ejectment brought by Seymour for the recovery of the said lot, and that he

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may be also restrained from diverting or obstructing the flow of water from the spring to the complainants' mill.

Upon the facts disclosed by the pleadings, and established by the evidence in this cause, the complainants have an unquestioned title to the paper mill, with the appurtenances. The defendant has the legal title to the lot in Front street. Assuming the title from Gaunt to Griffen Green, under which the defendant claims, to be valid and operative, the material question in the cause is, whether the right to water flowing from the spring passed with the title of the lot upon which the spring is situated, or whether it remained in the grantor as an appurtenance of the mill. The water of the spring was diverted from its natural channel, and was conveyed to the mill, to be used in the manufacture of paper by a former proprietor of both lots, at least as early as the year 1845. The water was carried from the spring to the mill, a distance of eight or nine hundred feet, by means of iron pipes or conduits laid under ground. The diversion of the water was effected by the proprietor, at a great expense, for the exclusive benefit of the mill. It continued to be so used and enjoyed by the successive proprietors of the two lots for several years, and so long as the title of the two lots were united in the same person. It was so used and enjoyed by James Gaunt at the date of the conveyance of the Front street lot to Griffen Green, on the 31st of August, 1857. The deed is in the usual form of a deed of bargain and sale, and contains no express reference to the spring, or the water flowing from it, either by way of grant or reservation. The complainant insists that the grantee took title to the Front street lot, upon which the spring is situated, subject to the easement of the flow of water to the mill, as it was used and enjoyed by the owner at the date of the conveyance.

✓ In an elementary treatise of deservedly high reputation, it is said that the implication of the grant of an easement may arise upon a severance of an heritage by its

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owner into two or more parts. Upon the severance of an inheritance a grant will be implied—first, of all of those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements; and secondly, of all those easements without which the enjoyment of the several portions could not be fully had. *Gale and Whately on Easements* 49. ✓

The rule of the French law upon this subject, with the incidents of which the common law is said to agree, is thus laid down in the French civil code. “If the proprietor of two estates, between which there exists an apparent sign of servitude, disposes of one of these estates without inserting in the contract any stipulation relative to the servitude, it continues to exist actively or passively *in favor* of the land alienated or *over* the land alienated. *Code Napoleon*, book 2, tit. 4, § 694. ✓

Does this principle prevail at common law?

In the very recent case of *Lampman v. Milks*, 7 *Smith* 507, Justice Selden, in delivering the opinion of the Court of Appeals of New York, said, “The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burthens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognised modes in which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to the benefits and burthens mutually existing at the time of the sale.” ✓

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The principle thus clearly stated is fully sustained by the current of authority, both ancient and modern. *Robbins v. Barnes*, *Hobart* 131; *Nicholas v. Chamberlain*, *Cro. Jac.* 121; *Cox v. Matthews*, 1 *Vent.* 237; *Palmer v. Fletcher*, 1 *Levinz* 122; *S. C.* 2 *Sid.* 167; *Shury v. Piggot*, 3 *Buls.* 339; *Brakely v. Sharp*, 2 *Stockt.* 206; *Hazard v. Robinson*, 3 *Mason* 272; *United States v. Appleton*, 1 *Sumner* 492; *New Ipswich Factory v. Batchelder*, 3 *New Hamp.* 190; *Kilgour v. Ashcom*, 5 *Harr. & Johns.* 82.

✓ It is admitted that this doctrine applies in its fullest extent in support of all easements claimed by the grantee of that part of the premises first sold by the grantor on owner. Thus it is said, if Gaunt had retained the lot upon which the spring is and conveyed the mill, the right to use the water would have passed by the conveyance as appurtenant to the mill; but having retained the mill, and conveyed the lot upon which the spring is, the spring passes by the grant, and the grantor, or those claiming under him, cannot claim the easement of having the water for the use of the mill, for that would be in derogation of the grant. There is no doubt that several of the reported cases are made to rest upon this ground, and the principle may be safely invoked against the grantor in support of the broader right arising from the actual condition of the premises at the time of the severance of the ownership. But there are cases which do not rest upon this principle, nor can it be invoked in their support.

Thus in regard to what are termed easements of necessity, as where a man grants land in the middle of his field, the easement of a right of way across the grantor's land is said to flow by necessity from the grant. But if the grantor conveys the surrounding land, reserving to himself the centre of the field, he has the easement of a right of way across the land of the grantee. 2 *Dourier's Inst.* 190.

✓ So where land held in unity is partitioned, either by the voluntary consent of the parties or by judicial pro-

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ceeding, the owner of each share will take his part subject to all the burthens which were imposed and all the advantages conferred by the prior owner. In *Kilgour v. Ashcom*, 5 *Harr. & Johns.* 82, the action was brought for overflowing the plaintiff's land by a mill dam in the occupancy of the defendant. The land of both parties had previously belonged to one John Keech, who died intestate, and the land was partitioned by the authority of the Orphans Court among his heirs. The parties, plaintiff and defendant, held, respectively, the shares of the children. Upon the defendant's share was a mill, the dam of which threw the water upon the plaintiff's land. A small part of the dam was also upon his land. The court say the mill and the dam were at the time of bringing the suit in the same situation in which they had been left by John Keech, and had been held by him in his lifetime, and the question is, whether Samuel Keech and those claiming under him have a right to use them in the same way and to the same extent, and it is clear that they have. The children of John Keech took their respective proportions of their father's estate in the same condition and subject to the same advantages and disadvantages under which he held it.

In *Brakely v. Sharp*, (1 *Stockt.* 1, 2 *Stockt.* 206,) in this court, the same principle was maintained by the Chancellor, after a very full discussion and elaborate examination of the authorities. In that case the owner of a farm, upon which there was a spring of water, conveyed the water from the spring to two dwelling houses upon the premises. The owner died intestate. That part of the land upon which were the spring and one of the dwellings was assigned, by order of the Orphans Court, to the widow and one of the heirs. The part of the farm on which the other dwelling was, was sold by the commissioners under the order of the Orphans Court, and came, by sundry mesne conveyances, to the complainant. The bill was filed to protect him in the enjoyment of the water

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flowing through the pipe to his dwelling. It was held by the Chancellor that the aqueduct and the right to use the water, as it was held and enjoyed by the former owner, being essential to the beneficial enjoyment of the premises, vested in the complainant, and a perpetual injunction was granted to protect him in the enjoyment.

These cases show clearly that an easement may be created by the disposition made by the owner of an estate, and that upon the severance of title the owners will take their respective shares as they existed in the hands of the former owner. It was held, however, in the latter case, though the opinion was not essential to the decision of the cause, that if the owner himself had severed the unity of title he could not claim the easement upon the land on the ground that it would be derogating from his own grant.

In *Nicholas v. Chamberlain*, Cro. Jac. 121, which is one of the earliest cases on the subject, it was held by all the court, that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because it is necessary and quasi appendant; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require.

The question in this case came up upon demurrer, and it does not appear whether the house or the vacant land had been conveyed. But the court treat that as a matter of perfect indifference. In either event the conduit and pipes go with the house. This case has never been overruled, but has often been cited with approbation. *Hazard v. Robinson*, 3 Mason 279; *United States v. Appleton*, 1 Sumner 502; *Lampman v. Milks*, 7 Smith 508; *New Ipswich Factory v. Batchelder*, 3 New Hamp. 190.

In the last case, the Chief Justice, in delivering the

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opinion of the court, after citing the case of *Nicholas v. Chamberlain*, says, "The rule here laid down seems to us to be founded in sound reason and good sense."

In *Palmer v. Fletcher*, 1 *Lev.* 122, the case was, a man erected a house on his own lands, and afterwards sold the the house to one, and the lands adjoining to another, who obstructed the lights of the house. It was held that neither the builder nor any purchaser under him could obstruct the lights, on the ground that the grantor could not derogate from his grant. Kelynge, J., said, if the vacant ground had been sold first, and the house afterwards, the purchaser of the ground might then have stopped the lights. Twisden, J., to the contrary, said, whether the land be sold first or afterwards the vendee of the land cannot stop the lights of the house in the hands of the vendee or his assignees. The rule, as declared by Twisden, is now the well settled rule of the English law. *Riviere v. Bower*, 1 *Ryan & Moody* 24. ✓

In the recent case of *Lampman v. Milks*, 7 *Smith* 507, already referred to, the court say, "This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burthen has been imposed upon the portion sold, the purchaser, provided the marks of the burthen are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the existing parts."

The subject is carefully considered in the elementary treatise already referred to, and the rule, the ground upon which it rests, and the limitations to which it is subject, are thus stated: "To clothe with right this permanent alteration of the qualities of two heritages the consent of the owner of the servient tenement, in the manner appointed by law, is necessary; but where the land benefited and the land burthened belong to the same owner, he

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may change the qualities of its several parts at his will, and his express volition, evidenced by his acts, must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from his long continued acquiescence.”—“It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by another right, the general right of property; but he has not the less thereby permanently altered the quality of the two parts of his heritage, and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land burthened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it.”—“The reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent, or, in technical language, to those easements only which are apparent and continuous, understanding by apparent signs not those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.” *Gale and Whalley on Easements* 51, 53.

Every grant of a thing (says Mr. Justice Story) naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for. *United States v. Appleton*, 1 Sumner 502.

At the time of the grant of the Front street lot from Gaunt to Griffen Green the stream was diverted from its natural course through the land granted by an artificial channel to the mill of the grantor. The grantee took the land as it then stood with the water diverted from it. *Lampman v. Milks* is an express authority that the grantor could not return the water to its natural channel against

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the consent of the grantee. The grantee has a right to insist that it shall be continued as it was at the date of the grant, viz. in the artificial channel. He cannot have a right to elect in which channel it shall go. If the grantee have a right to insist upon its being continued in the artificial channel, the grantor must have an equal right to keep it there.

The easement in question, being apparent and continuous in its character, comes within the operation of the principle. The water flows naturally and continuously from the spring to the mill, the fall between the two points being about one foot. Owing to the length of the pipe, and the consequent obstruction to the flow of the water, it was found that the full benefit of the spring was not obtained. The owner, therefore, to overcome the difficulty, applied the pump, driven by machinery, directly to the pipe, and thus obtained the full advantage of the supply of water. It has thus been used nearly from the time that the pipes were first introduced.

Nor is the right of the parties at all affected by the grant of the right of diverting the water made by Gaunt to Griffen Green. It is somewhat difficult to discover the purpose of that conveyance. Viewed in regard to its apparent object, it is manifestly inoperative. In 1825, Harding, who owned the mill and the lot on Front street upon which the spring is, purchased of the owner of the land lying between the spring and the Assanpink creek an additional lot, lying between the spring and Washington street, together with the perpetual right of diverting to the paper mill of the grantee or elsewhere all waters rising or flowing over or from the land granted, so that it should not flow over the land of the grantor in its usual and accustomed course to the Assanpink creek. Harding acquired thereby the title to the land and the easement of diverting the water from its usual and accustomed channel across the land of the grantor to the As-

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sanpink creek. Easements are not rights distinct from the title of the land. They are imposed upon corporeal property for the benefit of corporeal property. To constitute an easement there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the obligation is imposed. *Gale and Whalley on Easements* 5; 2 *Bouvier's Inst.* 170.

By virtue of the conveyance to Harding, the spring lot became the dominant tenement, and acquired the easement of diverting the water from its accustomed channel to the Assanpink over the land of the grantor, which was subjected to the charge of losing the flow of the water. It passed with the title of the land itself. It could not exist separate from it. It was not annexed to the person of the owner. The title to the land could not be in one person, and the easement or right of diversion in another. When, therefore, the Front street lot was granted by Gaunt to Griffen Green the easement, or right to divert the water from its course over the adjacent lot to the Assanpink creek, passed with it. Now that is the easement which in terms this deed professes to grant, viz. the right of diverting the water so that it shall not flow over the intervening land into the Assanpink. For that purpose, as has been said, the grant is inoperative, because the easement had already passed by the grant of the land.

But it was suggested, upon the argument, that the effect of the grant was to authorize the diversion of the water from the paper mill. Such clearly is not the legal effect of the instrument. In very terms it authorizes the water to be diverted to the *paper mill* or elsewhere, as against the claims of the servient tenement, but not as against any other adverse right. The deed, I think, never could have been construed, as against Gaunt himself, into a grant of a right appurtenant to the paper mill, and destructive of the value of that property.

But, however this may be as against the mortgagee and

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attaching creditors of the mill property, it is clearly inoperative.

The clear weight of the evidence is, that the deed was neither executed nor delivered at the time it bears date, nor until the 23d day of January, 1858, the day upon which it was acknowledged. It was not recorded until the 7th of April, 1859. It could therefore affect no right of the mortgagee or attaching creditor, which were acquired long before. Viewed as a grant of a right to divert the water from the paper mill it was clearly a conveyance of property, which must have been recorded to give it priority over the rights of the attaching creditors.

The complainant further insists that the deed from Gaunt to Griffin Green, under which Lewis claims title, is fraudulent and void as against creditors, and that he has acquired a valid title to the premises under the attachment by virtue of the auditor's deed.

The writ of attachment under which the complainants claim title was not executed upon the Front street lot. That lot was not specified in the inventory and appraisal. No lien was acquired thereon by virtue of the writ, and the auditor's deed was inoperative to give title.

The evidence in the cause tends strongly to prove that the conveyance of the Front street lot from Gaunt to Green was not a *bona fide* sale, but was either fraudulent or intended as a collateral security for accommodation paper previously furnished by the grantee to the grantor.

The answer of Lewis states that the nominal consideration of the deed, \$5000, was paid as follows: \$1666 in cash, and the balance of \$2334 in two promissory notes at six months, one for \$1666 and the other for \$1668. The whole transaction, upon its very face, is in the highest degree unnatural and improbable. The grantor alienates the land and puts the purchaser in possession, taking in payment for two-thirds of the consideration money the promissory notes of the vendee, who is shown to be totally irresponsible, and who in fact never advanced one

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dollar on account of them. The amount of the notes was raised by a sale of the lot after Gaunt's death.

One of the notes is dated on the 13th of July, the other on the 18th of August, and both are payable six months after date. The deed is dated and executed on the 31st of August. They wear all the appearance of being mere accommodation paper. Green, the maker, declared that they were so, and that he never received any consideration for them. The account given of the payment of the balance of the purchase money is far from being satisfactory. It rests entirely upon the testimony of Green himself, who was a deeply interested witness, and is uncorroborated by a single circumstance. The answer of Lewis upon this point is of no value, for it is stated to be, as it obviously was, upon information merely. If to these circumstances be added the alleged grant of the right to divert the water from the mill and the lease of the water for two years from Green to Gaunt, for the use of the mill, the character of the transaction stands out in strong colors. The grantor, on the eve of insolvency, conveyed to his father-in-law two houses and a lot, which are proved to be worth \$5000, and which were paying an annual rent of \$300, together with the right to divert from a large and valuable paper mill a stream of water which was essential to its successful operation, and the lowest estimated value of which to the mill owner was \$5000, for the nominal consideration of \$5000, and receives in return \$1666 in cash and two promissory notes of the vendee, who was totally irresponsible, for \$2334, which were never paid by the grantee. It is hazarding little to assert that no such transaction ever was or could have been made in good faith.

As between the creditors of Gaunt, the grantor and the grantee, the conveyance must have been set aside as fraudulent or treated as a mere security for the amount actually advanced by the purchaser. But Lewis, the pre-

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sent defendant, stands upon different ground. He paid a full and fair consideration for the premises independent of the claim to the water right. There were certainly circumstances within his knowledge calculated to put him upon inquiry as to the character of the title of his grantor. Lewis no doubt at one time regarded the deed to Griffin Green as fraudulent, and acted upon that belief. On the other hand, the attaching creditors did not levy their attachment upon the property in question, thereby treating the conveyance to Green as valid. These complainants treated the conveyance as valid. They sued out an attachment against Green, and caused it to be levied upon the lot in question, and were proceeding to sell it in payment of the notes alleged to have been given by him as part of the purchase money. Under those circumstances, the lot being about to be sold under the attachment at the suit of these complainants as the property of Green, Lewis purchased for a fair price, and paid more than two-thirds of the purchase money to the complainants themselves in discharge of their claim against Griffin Green. Under such circumstances, the complainants do not stand in a position in a court of equity, either in their own right as creditors of Gaunt or under color of the right of other creditors, to contest the validity of Lewis' title.

The objection to the bill on the ground of multifariousness is not sustained. The sole design of the bill was to draw in question the validity and effect of the complainant's title to the Front street property. The whole ground of controversy is with one defendant, virtually by the same plaintiff, and respecting one subject matter. The objection is not raised either by the answer or by demurrer. There is nothing in the case to create embarrassment or perplexity in settling the rights of the parties.

The prayer of the complainant's bill, so far as it seeks to set aside the title of Lewis to the Front street lot, must

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be denied. The injunction restraining him from offering the title in evidence as a defence to the complainant's action at law must be dissolved. The injunction restraining him from diverting the water of the spring upon said lot from the complainant's paper mill, and from interfering with the flow thereof, as heretofore used, must be made perpetual. The decree will be made without costs against either party.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY,

AT NOVEMBER TERM, 1860.

Between JOHN BLACK and others, appellants, and JAMES
SHREVE and others, respondents.

A deed to be valid must go into the hands of the grantees with the consent of the grantors.

In the absence of all evidence to the contrary, mere possession by the grantee of a complete instrument is sufficient evidence of a lawful delivery.

Mere tradition of a sealed instrument, even to the party in whose favor it is drawn, does not necessarily in all cases make it a deed.

A sealed instrument, intrusted to a party with authority to deliver it to the grantee in case certain conditions are complied with, will not become a deed if delivered without compliance with such conditions.

If the instrument be once delivered to the party who on its face is entitled to it, it becomes *eo instanti* a deed, and no agreement in conflict with its plain terms will be permitted to be proved to show that its operation as a deed is to depend on the performance of some condition subsequent.

Where the proof is clear that final transfer of the instrument was not to be made unless certain terms were complied with, the law puts the party claiming its benefit to the proof of compliance.

Parol evidence to defeat an instrument as a deed is admissible to show that

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when the defendants, or some of them, signed the instrument, it was stated by them, to the agent procuring their signatures, that it should be binding on them only in the event of its execution by certain other persons.

Neither does it make any difference whether the agent ever communicated the limitation to the party accepting the deed.

The principle is settled, that one who claims through a special agent takes the risk of his want of power.

The minutes of a corporation are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation.

The object of an issue out of chancery to be tried by a jury is to inform the conscience of the Chancellor, and it is his province to determine what evidence shall be read before the jury.

The action of the Chancellor on the verdict is a matter resting in his discretion, and is not subject to review in the appellate court.

Where twenty-one out of thirty-seven stockholders of a railroad company sign and deliver a bond for the payment of \$35,000 to three of their own number, and it appears, upon the face of the instrument, that the bond was to be binding upon such as should sign it, and that each should come responsible when and as he signed it, parol proof is not admissible to show that it was not to be binding on any, until all the stockholders had signed it.—Per VREDENBURGH, dissenting.

A bond in the following words—"We, John Black, Thomas Haines, (naming nineteen others,) stockholders in the Delaware and Atlantic Railroad, send greeting: Whereas the Delaware and Atlantic Railroad Company borrowed of John Black and (two others) \$35,000, and whereas whose names are hereunto subscribed and seals affixed, have agreed with the said Black and others that in case the corporate property should fail to pay said \$35,000 and interest, so that a loss or deficiency should happen, that in that event each of us and each of them, the said Black and others, shall sustain an equal portion of said loss," expresses upon its face that each should become responsible when and as he signed it, and excludes parol proof that none were to be responsible until all the stockholders of the company had signed it.—Per VREDENBURGH, dissenting.

Browning and Halsted, for appellants.

Vroom and Attorney General, for respondents.

The opinion of the court was read by Judges WHELPLEY and OGDEN.

WHELPLEY, J. The amount of money, rather than the difficulty of the questions involved in this cause, invests it

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with more than ordinary interest. Were it otherwise, I should be content to cast my vote without attempting to assign reasons for it.

Without designing an elaborate examination of the law or evidence, I will proceed briefly to mention some of the many reasons which have determined me to cast my vote for the affirmance of this decree.

The respondents rest their case upon a single point—that the covenant of the defendants, upon which their liability depends, was never, in the legal sense of the word, delivered to the complainants, and that for that reason it never had any legal vitality though signed by them.

Until an instrument under seal is delivered by those who sealed it, or with their consent, it has no legal operation as a deed; delivery is essential for that purpose. It must go into the hands of the grantees or covenantees by the consent of the grantors or covenantors; possession acquired by force or finding, or in any other mode than by the full consent of the party to be bound, is ineffectual.

In the absence of all evidence to the contrary, mere possession of a complete instrument by the grantee is sufficient evidence of a lawful delivery.

Mere tradition of a sealed instrument, even to the party in whose favor it is drawn, does not necessarily in all cases make it a deed. A deed complete in form, signed and sealed, may be handed to the party for inspection. If he should refuse to return it, and claim that the mere tradition of the paper so executed was a legal delivery, he could not hold it. The answer would be, that the tradition, although to the party, was not a delivery of the paper as a deed. It was not a final parting with the custody of the paper. A taking under such circumstances would be a tortious taking. Trover would lie for the paper. It would be a mere lending of the paper, not a delivery. So if the party to be bound suffer the paper to go into the hands of a third person, with authority to de-

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liver it in case certain conditions are complied with, a transfer of the paper without compliance with the conditions is no delivery for want of authority in the agent to do the act. It is the duty of the party thus accepting a tradition of the instrument to see to it that the agent in the act of transfer is authorized to do it, unless he be the party's general agent. If the instrument be once delivered to the party who on its face is entitled to it, it becomes *eo instanti* a deed. No agreement in conflict with the plain tenor of the deed is permitted to be proved—to show that its operation as a deed is to depend upon the performance of some condition subsequent.

I fully concur in the clear and learned opinion of Hornblower, C. J., in *The State Bank v. Evans*, and that of Chancellor Kent, in his Commentaries, 4 *Kent* 454, that the distinction between a delivery of the instrument, as the deed of the party to a third person as agent to be delivered to the grantee upon the happening of some contingency or the performance of a condition, and a delivery of the instrument as an escrow, to take effect as a deed upon such contingency happening or condition performed, is too subtle and evanescent to control so common a transaction.

In the one case, the sealed instrument is handed to the agent complete, so far as execution is concerned, that is signing and sealing, and so it is in the other. In neither case is the party bound by it until the contingency happens or condition performed. In neither case is it, in the full legal sense of the term, the deed of the party. In both cases it is not the deed of the party, because it has not come into the possession of the grantee, or if it has, without the consent of the grantor. In both cases the grantor has done nothing more than consent that it may go into the final possession of the grantee upon terms complied with. It seems to make no difference in what form of words the depositary is authorized irrevocably to transfer the possession of the instrument to the grantee.

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What different legal consequences flow from the words, I deliver it as my deed, to be handed by you to the grantee upon compliance with the conditions, or the words, I hand it to you, and authorize you to utter the words or to do the act, from which the law conclusively infers the utterance of the words, *qui facit, per alium facit per se*. The conclusive act is the authorized traditions of a complete instrument; that constitutes a delivery—nothing else does. The case of *Evans v. The State Bank* has stood for twenty-five years as the settled law of this state. It accords with principle and the weight of authority and furnishes a plain practical rule of practice.

I do not perceive that any practical inconvenience can result from this doctrine. The power to transfer the custody of the paper seems just as irrevocable, if made so by the grantor, in the one case as the other. If it be a conveyance of lands, no title will pass until the contingency happens or the condition is performed. I do not think it necessary to review the cases cited in the opinion of the Chancellor or on the argument.

Although the custody and possession of a complete instrument under seal by the grantee, covenantee, or obligee is sufficient evidence of delivery, if not overcome by proof that the grantee came improperly into possession of it in ordinary cases, yet where the proof is clear that the final transfer to the party was not to be made unless certain terms or conditions were complied with, the law puts the party claiming its benefit to the proof of compliance. The power to transfer is subject to the performance of a condition precedent, which must be proved, and is not to be inferred from the unexplained possession.

It is a question of agency, and the power of the special agent to do the act must be shown. *Story on Agency* 126; *Paley on Agency* 194; 3 *Kent's Com.* 620, 4th ed.

The power of an agent to do an act is not to be inferred from the act alone by him as such; the power and its

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extent must be shown either by direct or circumstantial evidence.

The question of fact to be decided by this court upon the evidence, attaching such weight to the finding of the jury upon the issue ordered by the Chancellor to inform his conscience as upon the evidence before them it may seem to merit, is, did the covenant, signed and sealed by the persons whose names appear upon it, ever pass into the possession of the complainants finally and absolutely by their authority. If the complainants have established this fact they are entitled to a decree for the performance of it; if not, the bill must be dismissed.

As the covenant is perfect on its face, and is in the actual possession of the complainants, the only question seems to be, did it come to their possession, there to remain by the consent of the covenantors?

Upon the principles stated, this depends upon the single question, was its delivery to the complainants—I use the term in its full technical sense—forbidden unless all the stockholders of the Delaware and Atlantic Railroad Company executed it?

It is obvious that, as all the stockholders did not sign and seal it at the same time, and as it was carried about by different persons to obtain signatures, that the liability of those who did sign and seal it could be prevented from attaching at the moment of execution only by a declaration by those, or some of those who signed, that it should not bind them unless all signed and sealed it; that was a declaration that, as to them, the instrument was incomplete, unexecuted, until all signed and sealed it. If it was so to be considered, such a declaration could not have been intended to limit their liability upon a completely executed and delivered instrument, but as a declaration, that until that was done the covenant was not executed, and was therefore unsusceptible of delivery, and not to be delivered.

This is the precise issue made by the bill and answer

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stripped of the verbiage rendered necessary by the double meaning of the term *delivery*, signifying, as a popular word, mere tradition, and in legal phraseology meaning the *final absolute transfer to the grantee* of a complete legal instrument sealed by the grantor, covenantor, or obligor.

This is what the complainants' bill means when it states that the defendants did make, execute, enter into, and "deliver" the covenant. So, also, the defendants' answer means the same thing when, instead of denying in strict legal terms the delivery of the instrument, it states the acts antecedent to and attending the transfer, avoiding the denial of a legal proposition composed of blended facts and law for the purpose, proper in itself, of refraining from swearing to a conclusion of law, and therefore using the term *deliver* in its popular sense, as signifying transfer of possession. It states that the agreement, when executed by those who did so, was executed, that is signed and sealed, subject to an express understanding that it was to be executed by all the stockholders of the company, and that the same was not to be obligatory and binding on such as did execute until it was so executed by the other stockholders, and denies that the covenant ever was or could have been delivered as a binding instrument, until the other stockholders executed the same. Laying aside all mere logomachy, this is a clear and full denial of two things.

1. That the instrument ever was completely executed as intended by the parties.

2. That, as a consequence, there was no legal delivery—a denial of legal delivery. That all were to execute, and did not so do, are stated as showing that there was no legal delivery.

The facts are stated, leaving the court to determine upon them the question of legal delivery. The answer further states, that many of those who did sign, as well as those who refused, were urged to execute on the special

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ground that the same was to be binding on those who did execute only in the event of its execution by all.

For such a purpose it is clear that such evidence is admissible. Its object and design, as well as effect, do not contravene the rule excluding parol evidence from varying the terms of a written contract. It was to show that the instrument was incompletely executed; never had any existence as a deed, not to alter the meaning of a single sentence, or add or take away a single provision.

Who were to sign it did not appear, except by those who did. On its face, it does not declare who were to sign it. That may be proved by parol.

— Nor is it necessary, to support this defence, to show that the complainants were parties consenting to such an agreement. If those who signed it limited the power of the agent who procured the signatures to deliver it, by declaring that they would not be bound unless all signed, it makes no difference whether the agent ever communicated that limitation to the complainants or not. No principle of law is better settled than that one who claims through a special agent takes the risk of his want of power. It does not appear, by the evidence, who handed the instrument to the complainants, nor how they came into possession of it.

It would seem, by the minutes of the company, to have been in some way considered as in custody of the company. The minutes of February 23d, 1835, say that a new bond was presented by the secretary, for the purpose of effecting the aforesaid loan, signed by a number of the stockholders. John Black and Benjamin Jones undertook to effect the said loan in conjunction with Jeseeph Smith, and to report at next meeting. At the next meeting, John Black reported the loan in Philadelphia had been made, and the money ready. Neither of these minutes speak of the transfer of the covenant or bond and mortgage to Black, Smith, and Jones. This fact renders it unnecessary to decide whether, if an agent of

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the defendants, with instructions not to deliver unless the signatures were all obtained, had delivered it without making the limited character of his power known to the complainants, and they had taken it in good faith without notice, the defendants would have been held. No such delivery is shown, and in consequence the complainants cannot claim the protection of *bona fide* holders of such an instrument. All this assumes the execution upon condition by all who did execute; for that essentially alters the position of the case upon the point, who is to take the burthen of proof, the plaintiffs of actual transfer, as a complete instrument, or the defendants, of the negative?

In considering the last question, upon which the decision of this case turns, whether the instrument was ever executed by all those who were to execute it, and therefore capable of delivery, it is not my object to attempt to exhaust the evidence in framing an argument to show that it never was so executed, and to answer the able and ingenious arguments of the appellants' counsel. In attempting so to do, perhaps I should satisfy neither them or myself. I wish to give some of the reasons in the general, rather than in detail, for the vote which I shall give for affirming the decree.

Waiving, for the present at least, the effect of the verdict of the jury, I have come to the conclusion that the instrument was never executed by all who were to execute it; that some, at least, executed under the express condition that all the stockholders were to do so; that the covenant is joint and entire, and if the instrument is null as to some, it is so as to all.

1. The allegation of defendants' answer, that before the covenant was executed by any, there was an agreement as to who should execute it, and that it was to be by all, is in the highest degree probable.

I cannot believe that those who had an inconsiderable interest in the stock of the company would ever agree to guaranty the payment of so large a sum as \$35,000, to be

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paid by them equally, unless they knew who were to be jointly bound with them; and if some were willing to do so, that all those who signed were willing. I have equal difficulty in believing that the complainants would be willing to take the guaranty of any number, no matter how small. There must have been, from the very nature of the case, a preliminary agreement fixing who should sign and be bound.

The complainants have no answer to make to the question, who made the agreement to be bound by signing such a covenant? Their bill sets forth no preliminary agreement to the act of execution; they say the persons who signed, naming them, made, executed, and delivered the agreement. The allegation of their counsel and the evidence discloses no meeting at which the parties who did execute decided to sign it separate from the others, or any meeting of the subscribers at which those who signed consented that application for signatures might be suspended, and that they who had signed would undertake the whole burthen.

Their case must rest upon the simple allegation, that those who did sign, by that act, each for himself at the time of signing, agreed alone to bear the burthen, so far as he was concerned, no matter who might refuse to share it with him. If there was no preliminary or subsequent agreement, I see no escape from this predicament.

The mode in which it was signed makes this manifest. When presented by the secretary at the meeting of the 25th of February, 1835, the minutes and the evidence both say it was signed by a number of the stockholders. It was not complete then; no one was bound, unless the act of signing bound him absolutely. A committee was appointed to carry it round, consisting of Chalkley Atkinson and Dr. Dakin, to get their signatures. Did any one except the last one, and did he even, know when it was completely executed?

The history of the execution of such a paper shows

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that the very mode in which the signatures were obtained contemplated either a previous action or subsequent assent of the signers, defining the extent of their liability, so far as it depends on the number of signers.

The theory of the defendant is, to my mind, utterly incredible; business of that magnitude and importance never could have been so transacted.

2. The answer of the defendants, setting up the agreement as to parties who were to execute, is strictly responsive to the bill and evidence for them. A moment's consideration of the case will make this apparent. The bill charges that the agreement was delivered as well as executed. We have already seen that delivery means something more than mere tradition of the paper; the statement is of a full technical delivery of the instrument in a complete state, final and conclusive. If the answer admitted that, and set up matter to avoid it, such matter would be irresponsive. It does not admit any legal delivery, on the contrary denies it, without even admitting that the complainants, by any transfer, acquired the legal possession of the instrument. The facts stated show, if true, conclusively that there was no delivery, even if there was an unauthorized tradition of the paper to the complainants.

The answer does not attempt to avoid a full delivery by matter admitting it to have taken place, but by matter utterly inconsistent with any delivery. The answer is entitled to all the weight to which any answer can be entitled.

3. The evidence of Chalkley Atkinson, John Gibbs, and Thomas Haines.

Atkinson, in particular, swears, most unqualifiedly, that the agreement was to be signed by all the stockholders. He says he took the paper round, and that all to whom he applied were informed that it was to be signed by all the stockholders; that he got several to sign it. Upon this point he was not cross-examined; he

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says it was the present covenant, not the one first prepared. I can see no good reason for supposing that he has confounded one paper with another, for he has signed it himself. I do not rely upon the evidence of John Gibbs; there is enough without it to satisfy my mind. The testimony of William Irick is entitled to much weight; he says that Joseph Smith told him, on one or two occasions, that John Black had deceived him by signing a bond, by stating that all the stockholders were to sign it. This was about the time the loan was made. The evidence of Mr. Emley, that Joseph Smith complained to him of John Black; that he came to him with the bond, stating that the rest were to sign it also, and that he signed it; also he complained that the rest had not signed.

This shows not only the agreement, but that one of the complainants knew it at the time, and that he and Black were parties to it.

The signing of the paper was not a corporate act; it could not, nor was intended to bind the corporators as such. For this reason, I think the minutes of the company are not competent evidence of any agreement made by the stockholders as individuals, and not intended to bind the corporation. They could not bind all to sign by any resolution, nor exempt any by the same mode. What took place at these meetings must be proved orally, and then can affect only those present and consenting.

The evidence, or the outlines of it, as given in the report of Justice Potts, is not before us, except collaterally, to be used in determining what weight is to be given to the verdict. It was not before the Chancellor as evidence in the cause upon the final hearing.

Among the many arguments pressed with great power by the counsel of the appellants, I was at first inclined to attach much importance to the fact, that the complainants had advanced the money, and must have done so on the faith of the covenant, and that this was persuasive evi-

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dence that it had been duly executed and delivered. I am now satisfied that it is not of much probative force.

The complainants may have supposed that a covenant, executed under the circumstances disclosed by the evidence, bound the parties acting upon the legal principles asserted by their counsel upon the argument, or they may have believed, what the evidence shows they stated to some of the stockholders to induce them to sign it, that the property and resources of the company were sufficient to indemnify them for the advance. It is charity to suppose they believed what they stated to some of the minor stockholders. Nor do I attach much importance to the phraseology of the covenant at its commencement, when defining the parties, nor to the difference between the old and new agreement in verbiage and provisions. I mention these merely to show that I have not failed to consider them.

As I have come to my conclusion in this case without relying upon the verdict of the jury, it is not necessary that I should express any opinion upon the questions pertaining to that issue discussed so earnestly by counsel. I entirely concur in the view expressed by the Chancellor as to the power of the court to award such an issue as to its control over the framing of it, as to the admission of evidence upon the trial. It is the exclusive province of the Chancellor to determine what evidence shall be read, and what not. It is the law of the court, on an application for a new trial, and the effect of the verdict when rendered, that he may decide in accordance with it or against the finding. The whole object of such an issue is to inform the conscience of the court. His action on that issue and the finding was a matter resting entirely in discretion, and not subject to review in the appellate court. This court possesses no power to award such an issue, or to reverse the proceedings and remand the cause with any such directions; our duty is to rehear the case upon the evidence and proceedings, as they stood before hearing,

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unless he refused to admit legal evidence to be taken. If illegal evidence was heard by him, he must overrule it here; if legal evidence was overruled, we must hear it, if the witness has been examined and the depositions are here.

But if we had the power to review the exercise of his discretion in refusing a new trial, it was exercised rightly by him. The main reason assigned for a new trial was, that the issues were not properly made up. I think they were, for the reasons assigned by him.

And that the evidence of John Black was not received. As the issue was made up to get the opinion of a jury upon the case as it stood before him, he could have directed that it should be heard upon the evidence as it appeared in the depositions, and have prohibited the introduction of other testimony. Black had not been offered as a witness before him or examined when he heard the cause. It was discretionary with him to permit him to be examined or not, when offered, after he had himself rested his cause in chancery, and asked the opinion of the court upon the evidence as it stood. He was a competent witness in the Court of Chancery under the act of 1855, *Nix. Dig.* 887. I have shown that the answer was responsive to the bill.

The proceeding before Justice Potts at the Burlington circuit, as appeared by the record, was strictly *legal* in form; it was a common law issue, to be tried according to the rules of law, except where otherwise ordered by the Chancellor. Nor was it of an equitable character in substance. No equitable relief was sought by it. It was not so either in form or substance. It is a complete confusion of terms to call it a proceeding of an equitable nature. How can a suit be of an equitable nature which is so neither in form or substance? It was ordered by a court of equity; but nevertheless it was a trial at law. The statute was passed to permit a complainant or petitioner, when suing as such in the suit or proceeding in which he

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appeared as such, to be sworn as a witness in a certain case. It was not designed to control the trial of a feigned issue: that is a proceeding which the legislature have not regulated; it is the creation of a court of equity. No statute should be held to apply to it, unless it does so in express terms.

It is of great importance to preserve the power of the court over such an issue untrammelled. The suit was neither equitable in form, in substance, or effect. It was not by bill or petition. It was in form an action for a wager; no equitable relief was asked by it; the verdict, when rendered, was nothing but a finding that the plaintiff had not made out his assertions, and had lost the money wagered—was not entitled to the \$200. The effect of it was not to grant any equitable relief—it was mere evidence on the final hearing.

I am fortified in my conclusion in this case by the finding of the jury. They had before them more evidence favorable to the complainants than the Chancellor had on the final hearing. No corruption or partiality was charged against them. It is the opinion of twelve unbiased men, *omni exceptione majores*, upon the very question presented for decision. It is entitled to consideration, and in a case of doubt ought to turn the scale already inclined against the complainants, though the evidence should not thoroughly satisfy our minds. The more I see of juries and their verdicts the more I am satisfied that it is the best mode of determining disputed facts ever devised by the wit of man. I mean, of course, where the jury act as fair men, uninfluenced by passion or prejudice.

The verdict is the average judgment of twelve men on the disputed point. One mind is apt to go astray in its conclusions, unless checked and moderated by the views of some other, who looks at the question from another station seeing it in another light, and having attended to another part of the subject perhaps overlooked by the other. Again, this case was three times laboriously

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argued on the merits before the Chancellor, and carefully considered by him. Although this is a court of appeal upon the whole case, hearing it *de novo*, yet some respect is due to the judgment of the court below on a question of fact, at all events where the law and evidence do not clearly lead us to a contrary conclusion.

The last and least reason having any operation on my mind is, that if the decree be affirmed, the loss to be sustained by the failure of this enterprise will fall where natural justice, irrespective of the agreement of the parties, would place it—upon its principal promoters—those who, in the period of its apparent success, reaped its substantial benefits—for whom its labors were expended—whose property, large in extent and value, was, by means of it, made to yield such increased profits as to rob the final catastrophe of all its terrors, leaving them with the loss of all their expenditure in original stock and in this loan, it would seem from the evidence, not materially worse off than if they had not so invested the money. To me all these parties are strangers, and I came to the consideration of the case with no prepossessions to be removed or prejudices to be overcome, impressed with the magnitude of the stake subject to my award. I have given it a long and anxious examination, sincerely desirous to do justice according to the principles and rules controlling the action of a court of equity in the last resort; and, as the result, my mind has settled down into a firm conviction that the complainants' case cannot be supported either on the law or the evidence, and that the final decree appealed from should be affirmed.

OGDEN, J. The amount involved in this issue, the length of time which has elapsed since the bill of complaint was filed, the graveness of the questions which are presented, and the great industry and zeal displayed by counsel upon the argument before this forum of the last resort, invest the case with peculiar importance, and de-

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mand for it the full and thorough investigation and consideration of the court.

The appellants, having been unsuccessful in all their previous applications for the relief sought by them, still have confidence in the justness of their claim; and they are entitled to the patient examination of their case in this ultimate tribunal uninfluenced by previous results. Their bill of complaint was filed, on the 11th of June, 1846, against parties who signed and sealed a certain covenant and the personal representatives of such of them as had died. It prayed for a discovery, from the defendants therein named, whether certain persons, on the 2d of June, 1845, were solvent and able to pay to the complainants proportionate parts of a loss and deficiency alleged in the bill to have been sustained by them through a loan which they had made to the Delaware and Atlantic Railroad Company. It charged that the defendants were liable to them for contribution by virtue of their covenant, dated the second of February, 1835; and it further prayed that an account might be taken of what was jointly due and owing to them upon the covenant, and that the defendants should be decreed to pay their respective proportions of the loss or deficiency which, according to the true intent and meaning of the covenant and upon the principles of equity, they ought to pay.

The whole merits of the case, as contended for by the complainants, rest upon the binding effect of the covenant as an executed contract, they insisting that it is available in their hands as plenary evidence of an existing agreement, entered into by those who signed it, to bear and sustain with them an equal portion of such loss and deficiency as might result from making the loan; and the defendants insisting that the paper was not to be delivered as a binding agreement until it should be signed and sealed by all the then stockholders in the Delaware and Atlantic Railroad Company; and that, as it has to it the signatures of *only twenty-one* out of thirty-seven stock-

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holders, the complainants could not have become possessed of the instrument by a legal delivery of it to them as an executed contract. The final hearing was had before the Chancellor, on the 1st day of July, 1858, on the bill, answer, proofs, and the verdict of a jury, rendered upon a feigned issue; awarded by the Chancellor, on his own suggestion, to be tried in the Supreme Court by a jury of the county of Burlington, directing them to inquire and determine whether an instrument, bearing date the 2d day of February, 1835, set out in the complainants' bill, was executed by the parties thereto as their act and deed unconditionally, or upon the understanding or agreement that the same should also be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before it should be delivered as an agreement binding upon the subscribers; and whether the same ever was in point of fact legally delivered by the parties thereto, or by their authority, to the said complainants, or either of them. The response of the jury was, that the agreement was signed *conditionally*, upon the understanding and agreement that it should not be delivered as binding before it was executed by all the stockholders; and that it never was, in point of fact, legally delivered by the parties thereto, or by their authority, to the complainants, or to either of them. The Chancellor thereupon, and upon a full consideration of the whole case, ordered that the bill of complaint should be dismissed with costs.

The petition of appeal, dated February 24th, 1859, which should contain briefly the grounds of appeal, states that the appellants, complainants below, are aggrieved because the decree adopts and is founded upon the proceedings respecting the feigned issue, in which the Chancellor, in his interlocutory decree directing the issue, also directed that the bill and answer filed in the case might be read in evidence by either party, and likewise the depositions of such witnesses as had theretofore been ex-

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amined, and might be dead or incapable of attending from sickness, or be out of the jurisdiction of the court at the time of the trial; and because the decree confirms the verdict of the jury and the report of the justice before whom the issue was tried at the circuit. The petition also states that the justice, on the trial at the circuit, admitted illegal, and rejected legal evidence, and charged the jury contrary to law.

It further alleges, as a grievance, that the Chancellor, on the coming in of the *postea*, refused to grant a new trial on the feigned issue; and that he also refused to grant a rehearing before himself; and, finally, that he refused to allow the complainants to be sworn or examined to disprove the allegations contained in the answer of the defendants.

Having the general grounds of appeal thus before us, it is necessary that the whole cause should be carefully examined, so that we may correctly adjudicate upon the rights of the respective parties.

The bill of complaint states the incorporation of a railroad company, at the time of filing thereof known as the Delaware and Atlantic Railroad Company, its organization, and the purpose of its creation; that the company became embarrassed from the inadequacy of their funds, which were insufficient to complete their road; and that, on the 9th of January, 1835, at a general meeting of the directors and stockholders of the company, held upon personal notice given to each one, a statement of the affairs and finances of the company was submitted to them, an examination of the state and condition of the road was made, and that it was ascertained that the company was largely indebted, and that the sum of \$9772 was then estimated as a sum necessary for the purchase of rails and for other expenditures which would be required for completing the road, so as to enable it to fulfil the objects for which its construction had been undertaken, and to enable the company to derive from it a revenue.

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The bill proceeds to state that the persons there assembled resolved that the company should borrow the sum of \$35,000, which sum appeared to be necessary for discharging their indebtedness and for completing the road; and that one Chalkley Atkinson, with John Black and Benjamin Jones (two of the complainants) were appointed a committee to negotiate the loan for and on the credit of the company, who subsequently, on the 23d of January, reported to a second general meeting of directors and stockholders that their efforts had proved utterly unavailing; that at this crisis in the affairs of the company, the complainants were induced, by the offer of the bond and mortgage of the company, and especially by the offer of the covenant or agreement therein after set forth, to borrow on their own credit, and to lend and advance to the company, as a loan to and for their use, the sum of \$35,000; that the bond of the company, bearing date the second day of February, 1835, in the penal sum of \$70,000 was duly executed and delivered to the complainants for the payment of the said loan in five years from date, with interest payable half-yearly; and that a mortgage to secure the payment of the bond was also delivered by the company to the complainants, duly executed and conveying all the lands within the bounds of their railroad.

The bill then states, that in order to indemnify the complainants against more than a proportionate part of any loss that might arise in consequence of the mortgaged property proving insufficient to pay the said debt, and in consequence of an agreement to that effect made previous to the complainants consenting to loan the money, which mainly induced them to make the loan, the defendants named in the bill and those whom some of them represent, together with the complainants, all being stockholders in the company, did make, execute, enter into, and deliver a certain covenant or agreement, bearing date the 2d of February, 1835, as follows, reciting the instrument in writing in words, &c., and that it was on

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the faith and security of the said covenant that the complainants were induced to make the loan, and without it that said loan could not have been obtained from them.

It is further set forth in the bill, that on the second day of June, one thousand eight hundred and forty-five, after deducting the avails of a sale of the mortgaged property, and all the dividends, proceeds, and profits of the road which came to the hands of the complainants, there remained a balance of \$54,552.89, for principal and interest due and payable to them, as a loss and deficiency upon the sum loaned by them to the company.

The bill, as amended, charges, that on the said second day of June, 1845, when the loss and deficiency were ascertained, the parties to the covenant, other than the complainants, who then remained solvent and able to pay, and the estates of such other parties who had died, which then remained solvent, became and were then, and at the time of filing the bill, liable and bound to bear and sustain the loss and deficiency equally with the complainants, or some part thereof.

The equity of the bill is put on the ground that the solvency or insolvency of the surviving parties to the instrument, and of the estates of such of them as were deceased, and their ability to pay their respective proportions of the loss and deficiency, was a fact almost always exclusively in the knowledge of the party himself or of the personal representatives of his estate, and was not capable of proof by another without a discovery from the parties themselves, severally and respectively, and from the representatives, respectively, of such as were dead, and also on the ground that the complainants being likewise covenantors, parties in the instrument, could not sustain an action at law upon it.

The defendants, in their answer, admit the incorporation and organization of the Delaware and Atlantic Railroad Company and their financial embarrassments; they also admit the several general meetings of the directors

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and stockholders, and that it was resolved to make a loan of money to the amount of \$35,000, and that the persons named in the bill as a committee reported that the money could not be procured on the security of the road. They state, as an extract from the minutes of a meeting of the stockholders, held on the 23d day of January, 1835, "that it was resolved, and agreed by the stockholders, that John Black, Joseph Smith, and Benjamin Jones do, by their joint obligations, get the sum of \$35,000; and that they have a mortgage on the road delivered to them; and that the *remaining stockholders* execute a joint bond to the said persons, so loaning the money, as security to them in case of any losses sustained by said loan, each one to bear his proportion of the loss." It is further stated, in the answer, that on the 2d of February, the mortgage, bond, and covenant were reported to a meeting for examination, and were sanctioned and adopted; that the bond and mortgage were then executed and delivered; but that the covenant to indemnify was not then executed and delivered by the stockholders of the company, a part of whom only were present at the meeting; that at a subsequent day or days, a covenant of the general tenor and effect of the one set out in the bill, dated the second of February, was executed by the persons stated in the bill.

The defendants then answering, each severally for himself, say that, as well at the time of the passage and of the entry in the minutes of the resolution for the execution of the covenant and agreement, as at the time of the execution thereof, it was expressly understood and agreed, by and between the parties thereto, that the same was to be executed by *all* the stockholders of the company, and that it was not to be obligatory and binding on such as did execute until it was so executed by the other stockholders, and that the complainants were cognizant of and parties to the agreement; and they aver, in their answer, that the said covenant to indemnify never

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was and never could have been delivered as a binding agreement until the other stockholders executed the same; that in point of fact, only twenty-one out of thirty-seven stockholders executed it, and those not at one time, but at different times; and that many who did sign, as well as those who refused to sign, were urged to execute it on the special ground that it was to be only binding on those who did execute it in the event of its execution by all.

The defendant, John Chambers, the holder of forty shares of the stock, in the answer says, that he objected and utterly refused to execute the paper, until he was told by John Black, one of the complainants, that all were to execute it; and that he never would have executed it but for such representation. And the defendants, in their answer, insist that the attempt to enforce the agreement against them, being a part only of the stockholders, is unjust and fraudulent, and that the agreement is not in law or equity binding upon any of them, but as to them is utterly void and of no effect.

If the question was placed on the bill and answers alone, the whole case of the complainants would necessarily fall, because the answers directly contradict the most material allegation of the bill, to wit, that the covenant to indemnify was entered into and was delivered to the complainants as a subsisting agreement.

The fact of its being in the custody of one of them could not shake the evidence furnished by the answers, inasmuch as, being covenanting parties to it themselves by their signatures and seals, they would have as much right to hold it until perfected as any one of the defendants would have. The complainants, by their replication, put all the allegations of the answers in issue, and some thirty-five witnesses were sworn and examined by the parties.

The cause was first argued before the Chancellor, in the term of February, 1856, upon the bill, answers, depo-

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sitions, and proofs; and having taken time for examination of the case, and advisement until the 26th day of November following, the Chancellor then directed the feigned issue to be formed in the Supreme Court to try and determine upon the validity of the covenant as an existing binding agreement, whether the execution of the instrument was consummated by delivery.

At this point of the case the appellants complain of the Chancellor, and say that he had no right to transfer the settlement of that question of fact to a jury. The practice of the court has always been, in the exercise of its discretion, if it thinks the rights of the parties can thereby be more certainly and satisfactorily settled, to direct a strongly controverted matter of fact to be tried in a court of common law by a jury. In some instances it has been done on the application of a party, and in others on the mere motion of the court, in order to relieve its own conscience and to be satisfied by the verdict of a jury of the truth or falsehood of the facts controverted.

The power is given in this state by legislation, found in *Nixon*, p. 92, § 44, and it has been recognised in several instances here, and also in other states. 1 *Saxton* 206, *Miller and Stiger v. Wack et al.*; 1 *Green's Ch.* 132, *Trenton Banking Company v. Woodruff et al.*; 1 *Johns. Cases* 436, *Le Guen v. Gouverneur and Kemble*, 6 *Johns. Ch.* 255; 4 *Blachford* 116, *Kay v. Doughty*.

Although the power exists in the court, its discretion on the subject should be sparingly exercised. It seems to me that the agency of a jury was eminently proper in the case before us. As already stated, the whole merits depend upon questions of fact.

If the rights of the parties, as to the ratio of contribution which would result from the due execution and delivery of the covenant, could have been adjusted and secured without the aid of equity, a common law court would have been the appropriate tribunal for settling the whole case; and hence the Chancellor acted wisely in re-

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ferring to a jury the finding of these important controlling facts, whether or not the paper was signed and sealed unconditionally, and whether it ever was legally delivered by the parties thereto to the complainants before he attempted to grant the relief prayed for in the bill of complaint.

A concise summary of the practice which regulates the power and discretion of the court in calling in the aid of a common law tribunal, to obtain its opinion on a matter of fact, will be useful in testing the validity of the remaining objections to the proceedings which were had in this case.

The manner of the proceeding is entirely under the control of the court of equity. It will often, by its order, suspend certain of the rules of evidence for the purpose of affording facilities for the trial of the issue. It frequently will direct the examination of one or more of the parties to the suit. It also will direct that the parties be at liberty to read the depositions taken in the cause of such of the witnesses as, upon the trial, shall be proved to be dead or unable to attend to be examined. As the whole proceeding takes place for the purpose of informing the conscience of the court, it is not bound down *strictly* to the forms and incidents of a regular common law trial. After the *postea* has been returned, the Chancellor, if he thinks fit, may make no use whatever of the verdict, but may treat it as a mere nullity. *Gresley's Equity Evidence*, from page 401 to 405.

So also in 2 *Daniel's Chancery Practice* 987. In ordering the trial of a question of fact at law, that court is not left to proceed entirely on its own rules of evidence, but rules in equity are frequently introduced. This is done by the Chancellor ordering the answer of a defendant to be read as evidence upon the trial of the issue, for the purpose of allowing the defendant to have it contrasted with the evidence of the witnesses.

In *Marston v. Brackett*, 9 *N. Hamp. R.* 350, it was held

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that the manner of proceeding to the trial of issues from chancery is under the control of that court. If, after the evidence has been taken for the hearing, the party moves for a trial by jury, the case should be tried there upon the same evidence on which it would have been tried had it been examined before the the Chancellor, unless, upon cause shown, he makes an order permitting further evidence to be introduced.

2 *Daniels* 1297.—The court directs the trial in such a way that all productions shall be made which it conceives to be useful on that trial—the creature of its own direction—and it may impose such restrictions on the parties as will prevent all fraud and surprise on the trial. Again, p. 1800, the course of proceeding upon the trial of the issue is generally the same as that adopted in ordinary trials at law, except where the Court of Chancery has given any special directions on the subject. It is merely a judicial proceeding to inform the conscience of the court. Page 1806.—There is a material difference between courts of law and courts of equity in the rules by which they are guided in granting new trials. The general principle acted on by a court of equity is, that if the application rests solely on the ground that the verdict was against the weight of evidence, and the judge states that, upon the whole, he was not dissatisfied with it, the court will *not* direct a new trial. Same, p. 1810.—A new trial may be directed on the ground of a misdirection of the jury by the judge, or because evidence which was offered was improperly rejected, *unless* the court is satisfied that the verdict is right, considering all the evidence, including that which was rejected.

In 5 *Johns. Ch.* 148, *Van Alst et al. v. Hunter et al.*, it rests entirely in the discretion of the Chancellor to award a new trial or not, according to the circumstances and testimony in the case.

It was objected, on the argument, that the Chancellor should have set the verdict aside, and have ordered a new

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trial at law, because the judge at the circuit admitted illegal evidence, and rejected legal evidence, and charged the jury contrary to law. Upon a careful examination of the charge of the judge, I do not find that he stated any principle of law whatever to which the plaintiffs could object, unless it was in his direction to the jury, that the evidence before them had not made a case which comes within the rule; that if a deed absolute on its face be delivered by the grantor to the grantee, it takes effect at once as an absolute deed, and cannot be avoided by parol proof of a condition precedent unperformed. There certainly is no error in this. It was not insisted on by the defendants, that although the instrument was delivered by them to the plaintiffs, its efficacy as an absolute deed depended upon the performance of a condition; but their whole defence rested on the contention that the covenant had never been completed nor delivered, and hence that it was of no vitality in the hands of the plaintiffs.

This direction of the judge also involves the legality of his rulings upon the admission of evidence, which was objected to by the plaintiffs. He admitted parol testimony to show the facts by which the defendants sought to overcome the *prima facie* case made by the plaintiffs, in their having the covenant absolute on its face in their possession. That testimony did not tend to contradict the written instrument, but it was introduced to show that the paper could not have come into the hands of the plaintiffs by a delivery from the defendants, or any of them, as an executed covenant. The view which is taken by the Chancellor of this matter, in his opinion, is clear and conclusive, and he is fully sustained by the authorities quoted. It will be sufficient in this place to cite the cases without a further statement of the rulings. 6 *English Com. Law* 479, *Johnson et al. v. Baker*; 1 *Wend.* 478, *Roberts v. Jackson*; 7 *Peters* 435, *Duncan's heirs v. U. S.*; 11 *Peters* 86, *U. States v. Jacob and others*; 3 *Green* 155, *State Bank v. Evans*. So likewise 1 *Greenl. Ev.* § 284.

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The judge committed no error in admitting that character of testimony, nor did he err in his instructions as to the effect of a responsive answer as evidence for a defendant. It is a fixed principle in the administration of equity jurisprudence that the defendant is entitled to the benefit of his answer as testimony; and such portions of it as are responsive to the allegations of the bill, and do not set up new matter, must be overcome by the oaths of two credible witnesses, or of one witness confirmed by strong corroborative circumstances.

In thus instructing the jury, telling them, in addition, that the weight of that piece of evidence was exclusively for their consideration, he did no injustice to the complainants. Several objections were made at the trial to the introduction of the written testimony of John Gibbs, taken in the examination of witnesses in chancery. It was contended that, as the second, third, and fourth questions and answers were objected to before the examiner, the judge should exclude them from the consideration of the jury. The introduction of the deposition as evidence was done by an order of the Court of Chancery. That order was made with the knowledge of both of the solicitors of the parties. The testimony had been read and used on the hearing before the feigned issue was directed.

If the counsel desired the decision of the examiner to be reviewed, the proper time for calling attention to the subject was on the hearing before the Chancellor, in February, 1856, or, at farthest, when the order for the issue was made. The Chancellor ordered that certain testimony, taken in the usual course of proceedings in the court, should be read on a trial at law, (which trial was a creature of his own direction) and it would have been wrong for the judge at the circuit to have questioned the legality of the testimony which the Court of Chancery had directed him to submit to the jury. It must be assumed that the Chancellor had passed in his own mind upon the legality of the testimony of Mr. Gibbs before he

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directed that, as an entirety, it *should* be laid before the jury, in case the witness should be incapable, through sickness, from attending at the time of the trial, or be then out of the jurisdiction of the court.

It was also objected that the book in which the minutes of the proceedings of the stockholders were entered was improperly admitted as competent testimony before the jury.

The proceedings of the stockholders, when convened, were entered by the secretary in the book wherein the record of the meetings of the directors was kept, and the authenticity of the book was established by several witnesses. It appeared in evidence that the minutes thus kept were read at the meetings of the stockholders and were approved by them; and certainly they were competent testimony to confirm the recollections of the defendants and witnesses as to the deliberations and conclusions of the persons who were in conference with John Black and Joseph Smith on the several occasions when the subject of the covenant was discussed. They were not read for the purpose of binding absent stockholders to the performance of an act resolved on by their co-stockholders, but merely to throw light upon the question of general intent, when the indemnity was talked about, and its extent was determined upon.

The complainants state, in their bill, that meetings of the stockholders took place, and that it was resolved and determined on by them at their meetings to take action for the relief of the company. The book of minutes received in evidence shows the several meetings to which reference is made in the bill of complaint, but it also shows that the instrument of indemnity was to be executed by all the stockholders. The resolution of those persons, thus convened, could not bind the absent stockholders to put their names to the proposed paper, but it is expressive of the condition upon which those who made the proposition, that the money should be procured by

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the complainants would become personally responsible to them.

The judge instructed the jury that it was within their province to determine how far the minutes produced had been proved to be a correct record of what occurred at the several meetings of the stockholders, and that they should give such weight to the book as they might think, upon the evidence connected with it, that it was entitled to receive. There was no error in the admission of that testimony.

The appellants further complain, that the judge refused to permit John Black, one of the complainants, to be sworn before the jury. It appears in the printed case before us, that on the coming in of the *postea*, the judge furnished the Chancellor with his minutes of the proceedings of the trial, showing the order in which the testimony was offered and read by the counsel for the respective parties, and accompanied with his certificate, that although the case was not free from difficulty, yet on the whole he was satisfied with the verdict.

Those notes show that the bill of complaint and the answer were read in defence on the first day of the trial, and that, on the third day, after all the testimony was in before the jury, Mr. Black was offered as a witness, not generally, but to disprove the allegations of the answers which had been read. The admissibility of the party as a witness rests upon the second section of an act of the legislature, which was approved on the 5th of April, 1855, and went into effect on the 4th of July. The first section of the act provides that interest in the event of an action or proceeding shall only affect the credit of a witness, not his competence; and, in the next section, it is enacted that the first section shall not be so construed as to render a party to an action or proceeding competent to testify in his own behalf; "provided, however, that the complainant or petitioner in an action or proceeding of an equitable nature, in any court, shall be a competent

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witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition."

It is manifest that if the proceeding had originated by an action instituted in the Supreme Court, and it had been competent to show the contents of an answer in chancery, that the plaintiff could not have been used as a witness in his own behalf. What, then, was the nature of the proceeding which was heard before Justice Potts? Was it of a legal or an equitable nature?

The circuit record, which was his authority for empannelling a jury, showed an issue of fact in the Supreme Court, affirmed on the one side, and denied on the other, without any reference to former equitable proceedings. So far as the nature of the proceeding itself was important, it was strictly of a legal character. The course of trial on such issues is generally the same as courts of law ordinarily adopt, unless the Chancellor gives some special directions for the purpose of facilitating the trial, and preventing fraud and surprise on either side. If in the present case the Chancellor had not directed the answer to be read, and the depositions of absent witnesses to be used, the judge could not have admitted them in evidence, because such proofs are unknown to a court proceeding according to the course of the common law. I am clearly of opinion that the act of 1855 was not applicable to the case, and that the judge rightly refused to permit Mr. Black to be sworn as a witness. The party cannot justly complain of the action of the judge. His right to become a witness in the original suit accrued on the fourth of July, 1855. He made no application to the Chancellor for extending the rule to close the testimony, so that he might be examined. The case went to a final hearing upon the bill, answers, and proofs on the first of February, 1856, and in November the feigned issue was ordered; yet no suggestion was made, that the testimony of Mr. Black was important for contradicting the re-

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sponses of the answers. When the Chancellor ordered that the answer should be read before the jury, an application could have been made to him to allow Mr. Black to be sworn to disprove the same. If he is possessed of valuable knowledge which would discredit the answers, he should have made the fact known at an earlier stage of the proceedings; and, perhaps, by so doing he might have saved the delay and expense incident to the feigned issue. It could not have been the intention of the legislature, in thus infringing upon the rules and practice in equity jurisprudence, to arm a complainant with a concealed weapon, with which, at the close of a conflict, he might prostrate his adversary. Such was the view of the Chancellor; and to prevent an abuse of the act, he made a rule in his court, on the 1st of July, 1858, that a complainant or petitioner, who desired to avail himself of the act, should be sworn and examined as a witness within twenty days after issue joined, and before any other witness should be examined in the cause.

The refusal of the Chancellor to order a new trial, because one of the subscribing witnesses had returned from an European tour since the rendition of the verdict, cannot furnish a substantial reason for reversing the final decree. He is not a newly discovered witness; his absence was not presented as a reason for postponing the trial at the circuit; and we would override the well defined rules which prescribe the bounds between exact law and equitable discretion, if we should allow that cause to influence our decision.

While I am not prepared to say that the question, whether a new trial in every case of a feigned issue, is so entirely within the discretion of the Chancellor that a decree made subsequent to and in conformity with a verdict which was clearly unlawful would not be reversed on an appeal, yet I am willing to concede much to the final view which that court may take of the whole case.

We have seen that the Chancellor may disregard the

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verdict altogether, and although he may have ordered an issue, he may afterwards ~~fall~~ back upon the case, as it was made before the issue was considered. This court, likewise, may so dispose of the case; and if it shall appear that substantial justice has been done, the irregularities and *illegalities* occurring in the court of law may be overlooked and disregarded. I have carefully and attentively examined the whole case, as it was presented to the Chancellor at the time of his making the final decree; and I am convinced by the proofs, that the paper which is the foundation of this suit was executed by the persons whose names are to it *conditionally*, and that it never was delivered by them, or with their knowledge or authority to the complainants, as a binding contract.

The decree of the Chancellor should, in my opinion, be affirmed with costs.

The following dissenting opinions were read by Judges VREDENBURGH and VAN DYKE.

VREDENBURGH, J. The sole point in this case is, whether a certain bond of indemnity, dated February 2d, 1835, and signed by both the complainants and the defendants, was, as against the defendants, legally delivered. The jury and the Chancellor have found as a fact that it was not.

The bond was made to indemnify the complainants for advancing, on or about the 9th of March, 1835, \$35,000 to the Delaware and Atlantic Railroad Company.

The complainants were the proper persons to whom it should be delivered. It was produced by them at the trial. No point of time since the advance of the \$35,000 to the road, in March, 1835, is shown when it was not in their possession. The bill charges, that previous to the loan the bond was delivered. The answer does not raise the question or aver that the bond, at or previous to the loan, did not come to the actual possession of the com-

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plainants. I see no reason to doubt that the bond did, at or about the time of the loan, come to, and ever since has remained in the physical possession of the complainants.

But the question intended to be raised by the defendants, and which is fully raised by their answer is, that although the bond was physically, yet that it was never legally delivered. The reason assigned why it was not legally delivered is this: those who signed the bond were *part*, but not *all* the stockholders of the said railroad company. And the defendants aver that when the bond was signed by them, respectively, it was understood by all those who executed it that all the stockholders should execute it before it should be binding upon any, and that, consequently, before such execution by all, no legal delivery could take place. The difficulty is not about the physical, but about the legal delivery of the bond. If there was no such agreement, there can be no question but that the delivery was legal. If the proof of the agreement fails, the delivery is undoubtedly good.

This raises two questions:

1. Can the defendants establish this agreement by parol proof?

2. If they can, have they done it?

First. Is it competent for the defendants to prove by parol that the bond was not to be binding on them unless all the stockholders signed it?

The bond contains the names of none except those who have signed it, nor does it refer to the other stockholders. The complainants advanced this \$35,000 upon the faith of it, and for many years the defendants stood by and quietly enjoyed its fruits. If the names of the other stockholders had been upon the face of the bond such proof would have been competent. Whether it would where they are all strangers to the face of the bond, I do not intend to express an opinion. It certainly would be of very dangerous tendency. But whatever doubt I might

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have as to the competency of parol proof in case of an ordinary bond, I have none under the peculiar language of this one; and for this reason, that the verbal agreement, which the defendants set up as existing *eo instanti* with their respectively signing it, is in the very teeth of the written agreement which they did sign.

The verbal agreement set up is, that none were to be liable until all the stockholders had signed; and the bond they did sign, by its express terms, was to be binding upon such of the stockholders as saw fit to sign it. The agreement between the parties might have been either that the bond should not be binding until all had signed it, or it might have been that it should be binding on all who signed it, and on each one as he signed it. If nothing had been said about it in the bond itself, it might, perhaps, have been subject to parol proof; but if the parties saw fit to say, in the instrument itself, which way it should be, parol proof is excluded.

Does the instrument show upon its face that the agreement was that it should be binding upon all who signed it, and upon each one as he signed it, and exclude the idea that it was not to be binding upon any until all the stockholders signed it?

The bond commences as follows:

"To all to whom these presents shall come or may concern: We, John Black, Joseph Smith, James Shreve, Clayton Atkinson, Chalkley Atkinson, Jonathan Smith, Timothy Field, Thomas Haines, Jonathan Scattergood, Richard Jones, Philip R. Dakin, Thomas Black, Jacob Ridgway, Restore S. Lamb, James Newbold, Benjamin Jones, John B. Bispham, John Chambers, Joseph Brown, Nathan Atkinson, A. B. Wood, stockholders in the Delaware and Atlantic Railroad Company, send greeting." These are twenty-one out of the thirty-seven stockholders.

It is singular that if the understanding was that all the stockholders were going to sign, or the bond be binding on none, it should simply have said—We, John Black,

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&c., stockholders. In so large a transaction, with so many parties, with so singular and special an agreement, would not the language have been "all" the stockholders, or at least "the" stockholders?

But, again, if the intention had been as the defendants contend, would not the names of all the stockholders have been inserted? Again, how does it happen that these names in the body of the bond are the precise names of those who have signed it? If the design had been that it was to be binding on all or none, we should have expected to find in the body of the bond the names of other stockholders as likely as those who did sign it. But if the design had been that it should be binding on those who did sign it, then all this is the natural result—then this preamble would not have said "all" or "the stockholders," but simply stockholders, and the name of each one, and no other, would have been put in this preamble as he signed it.

The bond then goes on further to state, that "whereas the Delaware and Atlantic Railroad Company borrowed of John Black, Joseph Smith, and Benjamin Jones, who are also stockholders in the said company, the sum of \$35,000, to be applied toward the completion of the said road, and to secure the payment thereof, the said board have given their bond and mortgage to the said Black, Smith, and Jones; and whereas *we, whose names are hereunto subscribed and seals affixed*, have agreed with the said John Black, Joseph Smith, and Benjamin Jones, that in case the corporate property so mortgaged should fail to pay the said \$35,000 and interest, so that a loss or deficiency should happen, that in that event each of us, and each of them, the said Black, Smith, and Jones, shall sustain an equal portion of such loss."

Each person, when he came to sign, is presumed to have read the instrument. There is no allegation that he did not, or that any fraud or misrepresentation was practised upon him. If he did, what did he read? Not

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that "the" or "all" the stockholders had agreed to indemnify, but that we, whose names are hereunto subscribed and seals affixed, have agreed so to indemnify. By the very terms of their agreement, each one made his own signature and seal the evidence, and the only evidence, who was to be bound by the instrument. They said, in express terms, that not all the stockholders, but those who signed and sealed should indemnify. In connection with the preamble, it says, we stockholders who sign and seal have agreed to indemnify. Again, in the latter part of the clause we last cited, it is said, "in case of loss, each of us shall bear an equal portion." Who are "us?" Clearly those who sign and seal.

This bond then goes on further to say: "and in the event that any of the said parties, that is, *of us who have signed these presents*, shall become insolvent, that in such case such of *us* as remain solvent shall bear such loss equally with the said Black, Smith, and Jones." Here is a distinct definition in the instrument itself who are to be the parties to the instrument—not the railroad—not the stockholders generally—but we who have signed these presents. Can we imagine that this language could have been inserted for any other reason than to preclude the possibility of such a defence as the defendants now set up? And again, "such of us as remain solvent will pay our proportion of the loss." Who are us? It is tantamount to saying again, "we whose names are subscribed" will pay.

This instrument then goes on further to state: "Now know all men by these presents, that in order to confirm the said agreement, and to give it legal operation and effect, *we, whose names are hereunto subscribed and seals affixed*, do hereby covenant, promise, grant, and agree, to and with the said Black, Smith, and Jones, that in case of loss, we will pay such sum of money as will divide said loss equally between such of us as remain solvent and the said Black, Smith, and Jones, that is to say, each

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of said several individuals to bear an equal part of said loss." Confirm what agreement? Is it not the agreement that those who sign and seal the instrument had agreed to pay their portion of the loss? Again, who covenant and agree to pay their portion of the loss? Is it not by the very terms, we whose names are hereto subscribed and seals affixed? Again, "each of said several individuals to bear an equal part of said loss." Who are "said several individuals?" They certainly are not all the stockholders, but only those of them who sign and seal. It is perfectly manifest that the words, we whose names are hereto subscribed and seals affixed, so unusual, so often repeated, were inserted for the very purpose of excluding the idea that all were to sign before any became responsible, and for the very purpose of binding all who signed, and each one as he did sign, and to make the signing of each one the test of his liability in common with all who should sign. These words were used for the express purpose of contradistinguishing those of the stockholders who did sign from those who should not. And I do not see how that object could have been expressed in more explicit and emphatic terms. The language of the instrument is equivalent to saying, such of us stockholders as sign this instrument agree to pay. The language is not, we stockholders agree to pay, or "we all three the stockholders" agree to pay; but the language is, we whose names are hereto subscribed agree to pay, and such of us who have signed and remained solvent agree to pay, and each individual who has signed will bear his proportion of the loss.

It may be said, perhaps, that there might nevertheless have been a parol agreement that those who did sign should not pay unless all should sign; but such parol contract would be in direct contradiction to the written instrument. A parol agreement, that the instrument is not to be binding until all the stockholders sign, cannot coexist with an agreement in the words, we whose names

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are hereto subscribed agree to pay, because, by this last language, they agree to pay if they sign. By the express terms of the instrument, they make their liability to pay depend upon their signing.

I am of opinion that the defendants, by the very terms of their written contract, have precluded themselves from proving by parol that they were not to be bound unless all the stockholders signed. But suppose said evidence was legal, the next inquiry is, have the defendants proved that when they signed it was agreed that none were to be liable unless all the stockholders signed. This would depend upon the proof.

NOTE.—Judge Vredenburg then considers at great length the weight of the evidence upon this question, which, at his request, is omitted.

VAN DYKE, J. This is a proceeding, instituted by the complainants in the Court of Chancery, to compel a contribution on the part of the defendants, based on a special agreement signed by all the parties, in which it is alleged the defendants bound themselves to indemnify the complainants against loss, which loss it is said has occurred. It seems to be admitted that the Court of Chancery is the proper tribunal in which to seek relief, if the complainants are entitled to it anywhere. The signing and sealing of the agreement is admitted by the defendants; but they set up and insist that the execution of the paper was a conditional execution, which condition was never performed or complied with, and that the instrument was never in fact delivered to the complainants by the defendants, or with their consent, as a binding agreement between them.

The bill of complaint was amended, and so was the answer; and although there were several grave questions started in the pleadings, they were not pursued either in the evidence or in the arguments of counsel, and the



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entire controversy is narrowed down to the simple questions, whether the agreement was in fact executed absolutely or conditionally, and whether the said agreement was in fact ever lawfully delivered by the defendants, or with their consent, to the complainants or either of them. After the evidence was closed, and the matters argued before the Chancellor, he was so much in doubt as to where the truth and justice of the case lay, that he ordered a feigned issue to be made between the parties, and the disputed facts before mentioned to be submitted to a jury before the Circuit Court of the county of Burlington. The trial was had, and the jury found the issues thus made in favor of the defendants. The Chancellor, although applied to for that purpose, refused to set the verdict aside or to grant a new trial or a rehearing of the case, but made his decree in favor of the defendants, in conformity with the finding of the jury. From this decree an appeal has been taken, and the matters are now before this court for consideration and review. If the case had been heard and decided by the Chancellor on the pleadings and proofs before him in the ordinary way, without the intervention of a jury, and if it were now before us for review in the same condition, I should feel less embarrassment as to my duty in regard to it. That grave errors occurred before the jury, and in connection with the reference to them, such as this court should not sanction, and such as a court of law should set a verdict aside upon, I do not doubt. But whether this court may properly disregard these errors, and treat the verdict of the jury and all the matters connected therewith as a mere nullity, as though they had never occurred, and proceed to affirm, reverse, or alter the decree of the Chancellor as we may think just and equitable, without any regard to the verdict of the jury, when we are satisfied that such errors have occurred, is an important question, lying at the threshold of this inquiry, and one which should receive the careful answer of this court. If we are bound to ex-

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amine the verdict of the jury, and the proceedings on which it is based, and if found to be clearly wrong, to revise the decree founded upon them for that reason, then we need not trouble ourselves with the merits of the case; but if, on the other hand, we may and ought to disregard the verdict of the jury, and all the proceedings on which it is based, however erroneous, absurd, or monstrous they may have been, then we may properly dismiss from consideration all that part of the inquiry, and pass at once to what we may consider the merits of the case upon the pleading and evidence as they are before us.

The difficulty of solving the important questions of fact were so great in the Chancellor's mind that he sought the aid of a court and jury in the premises. He obtained that aid. He received the verdict of the jury with the rulings and decisions of the court upon the trial. He adopted that verdict and these rulings as lawful and right, and based his decree upon them. Although the case was three times elaborately argued before him, the only opinion which he delivered confines itself to a justification of his reference of the case to a jury, and to a justification of the trial with all its incidents, vindicating at length his reference of the case and the issue found, as well as the decision of the court and the finding of the jury from all the complaints made against them, but enters into no argument whatever, or reference to the pleading or proofs, to sustain the decree which he made independently of the verdict of the jury. I do not object to these things, but refer to them to show that the Chancellor's decree was based greatly, if not wholly, on the trial and verdict. If, then, we find the decree of dismissal in this case, which we are asked to affirm, resting almost, if not quite, exclusively on the trial and verdict, and if we find the proceedings which included this trial and verdict filled with grave and serious errors, how can we affirm that decree with these errors patent upon the proceedings without seeming to affirm these errors?

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I do not deny the right of the Chancellor to make up a feigned issue, and seek the aid of a jury in his efforts to solve it, nor do I think that he has exercised that right improperly in this case. I admit his right to determine the principles on which the trial is to be conducted, the evidence to be used, the rules of law or equity to be applied, and that he may adopt or wholly reject the verdict when rendered; but if in doing this he commits any grave and serious errors, or if the court or jury, either by or without such directions, commit any such errors, which clearly affect the rights, and as clearly destroy the interests of a party; and if the Chancellor, either before or after the verdict, makes or adopts these errors as his own, and bases his final decree upon them, without any repudiation of them whatever, it is certainly, I think, not only our right, but our duty, on appeal to us to correct such errors, if injustice has been done thereby; nor is the large discretionary powers of the Chancellor any answer to this proposition. His discretion is considered to be large; but in the exercise of his discretion, however great, he has no legal right whatever to do wrong: nor can I admit that he can commit any error, in the exercise of his discretion or otherwise, which this court has not the power to correct. Courts of law, it is said, have the discretion to make blunders and commit mistakes which cannot be corrected on a writ of error; but even the discretion of law courts cannot shield their errors from review on a motion for a new trial when the whole case is open for examination. So here we have the whole case under review—all the pleadings, all the evidence, all the orders and decisions, verdict and final decree—and if in any one of them, or in any part of them, we can find an error that has wrought injustice or deprived the party of a clear and undoubted right, which results in his injury, it is not only our right, but our imperative duty to make the correction.

As before remarked, the Chancellor, in his final decree,

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the reasons for which are to be found in his written opinion, puts it, as I understand it, entirely on the verdict of the jury, which verdict, and the proceedings on which it was based, he defends and justifies in all their length and breadth, and places it on no other grounds. And yet that verdict and these pleadings are, in my opinion, so erroneous that I could not consent to let them stand as the law of the land, even if it were possible, in a legal way, to do justice between the parties by an entire disregard of the trial and all its incidents. But this I apprehend we cannot do; and hence I feel a greater necessity of reversing this decree on the ground of its being based on an erroneous verdict, to the end that that verdict may be set aside and a new trial had upon correct principles, or the cause heard in some other way, according to the well known principles of equity proceedings.

The Chancellor ordered the pleadings in this case to be read in evidence by either party before the jury, and this is complained of because the order, in this respect, was without discrimination or qualification. I do not think the order of itself is objectionable, and if it had been properly carried out at the trial, I should not feel at liberty to disturb the verdict on account of the form of the order; but these pleadings were so treated and used at the trial as to do great injustice to the complainants. We cannot suppose that the jury had any knowledge or correct notion of the force and effect of either a bill or an answer. The bill was not sworn to by any one, while the answer seemed to be proved by some half a dozen persons. The result of this state of things would naturally be, if not explained, that the jury would give full credit to the answer, and none whatever to the bill. And in point of fact, although the bill was read to the jury, the judge wholly failed to instruct them that it contained anything whatever to which they might or should give any heed, while he did in fact instruct them that the answer was to be received and treated as evidence,

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whether it was responsive to the bill or not. This was a most serious error, for, under such a charge, the jury would have been fully justified, if not required, to find the verdict as they did, without looking at any other evidence, and perhaps in defiance of it. Now we all know that a bill is just as much evidence, and quite as potent in a case as the answer. All the material matters in the bill that are not denied in the answer, if there be one, are to be taken as true, while nothing in the answer which is denied by a replication is to be taken as true, except what is really in answer to some statement or charge in the bill. Yet of this rule, so necessary and so absolute in chancery proceedings, the jury were not only left in profound ignorance of, but, so far as they were instructed at all, they were charged to give full force to the answer in all its parts, while they were left at full liberty to treat the bill as of no force at all. The judge was doubtless aware of the rule referred to, but through inadvertence did not give it to the jury in such way as to enable them to make a proper use of it; but, on the contrary, the charge was such as to enable, if not to require the jury to use the pleadings in a manner clearly opposite to that which the law requires. This is an error well calculated to do mischief, and one which this court ought not to affirm.

The complainants object to the verdict on the ground of the rejection of competent evidence at the trial. They offered as a witness John Black, who is himself one of the complainants in the suit. He was objected to on the ground that he was not a competent witness, and the objection was sustained. If John Black was a competent witness, then the rejection of his evidence was not only a grave error, but is one which we cannot possibly correct but by reversing this decree. If his evidence is competent, we are bound to consider it as material and important. He might have proved, for aught we know, that all the parties who signed the agreement, in a body, agreed

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to waive the necessity of having the names of all the stockholders to the paper, and agreed to make it absolute in its then condition, and that in fact they, in their proper persons, delivered it without condition to the complainants. But however important his testimony might have been, it was not before the jury nor before the Chancellor, nor is it before us, nor can we take any notice of it; and if we affirm this decree in its present condition, we must for ever deprive the complainants of the benefit of this evidence. The only way in which the wrong, if it be one, can be corrected is by reversing the decree setting aside the verdict of the jury, and opening the case anew to such evidence as may be competent.

If the evidence of John Black was properly rejected, it must have been because it was incompetent; and if it was incompetent at the time it was offered, it might have been because it was offered in an action, a proceeding not of an equitable nature. It could not have been rejected on the ground that there was nothing in the defendants' answer to disprove that was responsive to the bill. The defendants will hardly insist on this, nor could it have been rejected for the reason that the evidence between the parties had been closed; for the reference of the case to the jury completely reopened the controversy to the introduction of all legal testimony, without regard to the question, whether the witness had, or might have been examined before the master or not; and this applied as well to the parties themselves as to any others, if their evidence was competent in itself.

Whether, then, the testimony of John Black was properly or improperly rejected depends upon the question, whether the action or proceeding in which it was offered was one of an equitable nature. I am forced to look upon it in this light, and cannot see it in any other. The suit is in the Court of Chancery, and is of an equitable nature. The proceedings up to the time of the reference were all of an equitable nature, and all those proceedings



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were transferred, by the Chancellor's order, to the Circuit Court and jury, to be proceeded in by them under his express directions. This reference to a court of law and a jury was not at the request of either party, but at the instance of the Chancellor himself, who sought the aid, not so much of a court of law on important legal questions, as the aid of a jury in the solution of important and perplexing facts. If he had needed the aid of the law judges, he could have obtained it without the intervention of a jury; and when he received it, if he adopted it, it would have been the opinion of the Chancellor, and not of the Supreme Court; but the aid of a jury he could not obtain except through the intervention of a court, but neither the court nor the jury come to any final conclusion in the matter, but the court simply reports back to the Chancellor the proceedings which have been had before him, the same substantially as if the reference had been to a master, and the proceedings in the one case, as well as in the other, when report thereof is made to the Chancellor, may either be regarded or disregarded by him, as he thinks fit; because the proceedings are his own, substantially in his own court, and under his entire control; the only thing that is peculiar about it being that, as he has no power to bring a jury into his own court, he is forced, when he needs their aid, to seek it through the only channel in which their verdict can be obtained; but still the proceeding is wholly his own, and although the issue is said to be formed in the Supreme Court, yet in point of fact that court has nothing at all to do with the matter. The form of certifying papers may be gone through with, but there is no *postea* returned to that court for its action; for there is no action that it can possibly take, nor is there any notice which it can take of the proceedings had in the circuit. The *postea* is returned to the Court of Chancery, where the action properly belongs, and where it must finally be disposed of, and the worst that can be said of the proceeding out-

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side of the Court of Chancery proper is, the Chancellor stepping aside as it were, to seek advice in the solution of a doubt, which advice, when obtained, he is in no way bound by, but is wholly at liberty to accept or reject it at pleasure ; the proceeding all the while being a chancery proceeding well known to that court, and must be of necessity of an equitable nature.

It is said that this proceeding before the Circuit Court is a proceeding at law, because there is a technical legal issue framed between the parties. It is true there is the form of an issue, but it is such a form as was never found in a court of law when made up by the parties. This issue is termed a *feigned* issue, that is an *unreal* one, and although it may not be dignified with the title of a pious fraud, it may very well be termed an equitable humbug. It was never framed by the parties, nor with their consent, but was imposed upon them by the Chancellor, not improperly I think, for the pure purpose of aiding him in reaching a just and proper conclusion. All the issue which the parties ever made was by their pleadings in the Court of Chancery. This was an issue in a proceeding of an equitable nature. From this issue they have never voluntarily departed, nor asked leave to depart. And it is the same that was transferred, by a kind of legal jargon, to the Circuit Court. The suit was commenced in the Court of Chancery ; it was never out of that court, and it would seem absurd to suppose it could have been in two different courts at the same time. The reference of the matter to the jury, through the only form in which he could procure their aid, no more removed the cause from the Court of Chancery than if it had been referred to commissioners, or even to a master, to ascertain some particular fact. The one course is just as much a proceeding in chancery and as well known to its practice as the other.

The conclusion, then, to which I find myself forced is, that the proceeding before the Circuit Court was one of

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an equitable nature, caused and created by an order of the Chancellor, which he had a perfect right to make. That this order opened anew the investigation to all evidence that could have been legal at any stage of the cause; that the evidence of John Black was legal evidence at the time it was offered for the purposes contemplated by the statute; that the rejection of it was wrong, and assuming it to be material and important, did great injury to the complainants; and that that wrong can only be remedied by a reversal of this decree: for if we proceed to settle the case now upon its supposed merits, we will be found to do so without this evidence.

It is said that this evidence of John Black might have been taken before the master previous to the closing of the testimony, but this does not so appear. The law which made this evidence legal went into operation on the 4th of July, 1855. The replication was filed in September, 1854. There appears to have been a rule to close testimony, but when it expired does not appear. But all the evidence was taken prior to the 13th of March, 1855, except two unimportant witnesses, who were examined more than a year afterwards, and after the cause seems to have been argued before the Chancellor; and then the evidence was objected to on the ground that the rule to close testimony had expired. But the right to the evidence does not depend on the question; but any witness who was competent in the cause, at any stage of it, was competent before the jury.

I think, therefore, that this decree should be reversed, the verdict of the jury set aside, and a new trial ordered, if denied by the Chancellor, and the case opened to the reception of legal evidence until legally closed, and that the Chancellor make such new decree in the case as to him shall seem just and equitable.

I have not gone into an examination of the merits of the case; I do not think we are in a condition to do so: they are not fully before us. A proceeding has taken

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place in which the complainants have been, as I think, greatly wronged. The decree adopts those wrongs, and to have them corrected, I think that decree should be reversed, not on the merits of the case, but that the merits may be better and more fully examined into and the parties more fully and more fairly heard, to the end that exact and equal justice in a case of so much importance may, if possible, be done.

The decree of the Chancellor was affirmed by the following vote :

For affirmance—JUDGES COMBS, HAINES, RISLEY, WHELPLEY, CORNELISON, OGDEN, SWAIN, WOOD.

For reversal—VREDENBURGH, VAN DYKE, KENNEDY.

BETWEEN THE PROPRIETORS OF THE BRIDGES OVER THE RIVERS PASSAIC AND HACKENSACK, appellants, and THE HOBOKEN LAND AND IMPROVEMENT COMPANY, respondents.

The legislature, in 1790, incorporated the complainants, and gave them the power to build a bridge over the Hackensack river, to take tolls for man and beast passing over it, and by the same law enacted that it should not be lawful for any person whatever to erect any other bridge over said river for an hundred years.

In 1860, the legislature gave to the defendants power to build a railway from Hoboken to Newark, with the necessary viaduct over the said river Hackensack.

Under this last act, the defendants commenced to build a viaduct over the said river, described in their answer to the bill of complaint thus: "a structure, so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in the cars of the defendants; that the only roadway between said shores and

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said structure will be two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder."

- Held*, 1. That the said proposed structure was no bridge within the meaning of the complainants' charter.
2. That no structure across the river Hackensack, which had not a footway for man and beast to walk over on, was a bridge within the meaning of the complainants' charter.
3. That the term bridge, as known to the common law, was a structure over a river having a footpath for man and beast; and cases upon this subject reviewed.
4. By the complainants' charter, they may collect tolls from men walking over their bridge, and for animals walking over their bridge drawing their burthens; by the defendants' charter, they cannot collect tolls for such use of their structure: *held*, that the franchises given the defendants are not the same franchises as those given to the complainants, and therefore do not interfere with them.
5. The first, fifth, and sixth sections of the defendants' charter commented on and construed.

Zabriskie and *Attorney General*, for appellants.

Gilchrist and *Bradley*, for respondents.

VREDENBURGH, J. The appellants and complainants below filed their bill against the defendants, alleging that, in 1790, the legislature gave them the right to build a bridge over the Hackensack, and to take tolls for man and other animals carrying or drawing their burthens passing over it, and by the same law enacted, that it should not be lawful for any person whatever to erect any other bridge over said river; that they erected said bridge soon after, and have ever since been in the enjoyment of the tolls; that, in 1860, the legislature gave the defendants power to build a railway from Hoboken to Newark, with the necessary viaduct over the said river Hackensack, and that, by virtue thereof, the defendants have commenced, and intend to build a railroad bridge over said river, to the diminution of their tolls and without having made or tendered them compensation. They aver that the defendants' proposed bridge would be a

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nuisance upon their exclusive grant, and pray an injunction. To this complaint the defendants set up a variety of answers. Without expressing any opinion upon the others, I shall only consider the following three, *viz.*

First. That the complainants' charter does not confer on them a valid exclusive grant.

Second. That the structure the defendants propose to build is no bridge within the meaning of the complainants' charter.

Thirdly. That if it is, that it cannot interfere with any of their franchises.

1. Does the complainants' charter confer on them a valid exclusive grant to bridge the Hackensack?

The court below has found that it does. But as I conceive that the exigencies of the case do not demand its solution, I shall merely remark that, as regards this first question, I neither concur in or dissent from the opinion of the Chancellor. I shall however assume, in what I have to say, that he in this regard was right.

2. Is the structure the defendants propose to build a bridge?

The grant of power to the complainants is to build a bridge—the franchise is to enjoy the tolls granted. The prohibition is, that it shall not be lawful for any person to build any other bridge over the Hackensack. The defendants, in their answer, deny that they have commenced or intend to build *any* bridge within the meaning of the complainants' charter. They describe, however, very specifically the structure they *do* intend to build. In order, therefore, to entitle the complainants to their injunction, it must appear, from the answer, that the defendants' proposed structure would be a bridge.

In considering this question, the first idea which strikes us is, at what time are we to affix its meaning to the term bridge—in 1790 or in 1860? Nothing is more changeable than language. This is apparent from the numerous languages and dialects in the world. The English of to-

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day is a very different thing from that of Chaucer, or of even Shakspeare. We know, from our own observation, that all vocal signs are in a process, more or less rapid, of continual change. The term bridge is a sign for a thing. It may now stand as the sign for things which it did not stand for in 1790. I shall attempt to show hereafter that in this particular case it does not; but it may be so, and it is best, at the start, to settle at what time we are to take its meaning, for we cannot otherwise reason about it. If the structure the defendants propose to build had been erected in 1790, and would *then* have been called or been a bridge, it is within the terms of the prohibition. But if it would not *then* have been called or been a bridge, it could not become so *since*, within the meaning of the statute of 1790, by merely acquiring that name, or because we since have discovered a mode of passing over it. A structure which was not a bridge in 1790 does not become one by merely discovering a mode of passing over it. All we can say in such cases is, that since 1790, however, science has discovered a mode of passing over rivers on structures which were not bridges. Steam ferries have been discovered since 1790. Suppose they had since, in common parlance, come to be called ferry bridges, would they be within the prohibition? They are sometimes called so now. We say, the East river has been bridged by the ferries. Since the use of ocean steamers, the Atlantic is sometimes said to be bridged; and we do not know but that before this exclusive grant expires they may both, in common parlance, be called bridges. But if this should happen, surely that could not bring them within this prohibition. So with respect to the proposed structure of the defendants. If it had been erected in 1790, and would not in its essential structure have been a bridge, as the term was then used, it could not become so afterwards merely because we have discovered a mode of passing over it, or because it has since been called a railroad bridge or simply a bridge. To allow this

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would be to extend the exclusive grant over structures not embraced in the original grant, and that not by legislative power, but simply by enlarging the comprehensiveness of a word.

Our inquiry therefore is, what was the meaning of the term bridge in 1790? The term bridge is but the sign for a thing. What material thing did it then stand for in 1790, was it the sign of such a thing as the defendants propose to build? Of this the only arbiter is use, "*usus est arbiter et norma loquendi*." Before 1790, was the term bridge ever used to signify a thing in its essential structure like this proposed by the defendants?

In considering this, I shall assume as correct all the suggestions the complainants have made as to the rules for construing statutes. This is a question rather of precise definition than of the construction of language; as soon as we agree what meaning the term bridge had in 1790 the whole question is settled. I shall also assent to another suggestion of the complainants, viz. that their charter prohibits all kinds of bridges. If the proposed structure of the defendants had been erected in 1790, and would *then* have been within the meaning of the term bridge, it is within the prohibition. The complainants' charter intended to forbid bridges of all kinds whatever; but then it embraced nothing but a bridge. The thing prohibited must be a bridge.

I shall also assent to another suggestion of the complainants, that if the proposed structure of the defendants had been erected in 1790, and would in its essential structure have been a bridge, that it would have been within the prohibition, whether its peculiar kind was then known and in the contemplation of the legislature or was discovered afterwards. The legislature intended to prohibit all kinds of bridges whatever, whether then known or not; as for instance, the tubular bridge over the St. Lawrence, or the iron wire bridge over the Niagara, were

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kinds of bridges unknown in 1790, but they are in their essential structure bridges, and within the prohibition.

The question still remains, is the proposed structure of the defendants such a one as, in 1790, would have been called a bridge? In considering the question, I shall invoke the rules of construction urged by the complainants upon the argument, and the following ones in particular: "If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their ordinary and natural sense. The words themselves alone do, in such case, but declare the intention of the lawgiver." And again, "words are generally to be understood in their usual and most known signification." And again, "the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use."

Bearing these familiar rules in memory, let us paint the defendants' proposed structure to the eye, and see whether, in 1790, it would have been called a bridge, or been a bridge of any kind whatever, according to its general or popular use, or according to its technical use, or, I might safely add, any use whatever.

The answer describes the proposed structure very particularly. The defendants admit that they intend to erect a structure, so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam; that said structure will not be connected with the shore on either side of said river, except by a piece of timber under each rail, and must necessarily be made in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure except in the cars of the defendants; that the only roadway between said shores and said structure will be two or more iron rails, each of the width of two and one-quarter inches, and of the height of four and a half inches, laid and fastened upon timber, said rails

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being at a distance of four feet ten inches asunder. It will be perceived that the defendants do not propose to erect any mixed structure, such as, for instance, the railroad bridge over the Raritan at New Brunswick, or Reebing's bridge over the Niagara, which have a common bridge below and a railroad bridge above; nor is it a structure with a pathway and rails laid on them like a street railroad, and which furnish footpaths, but is a railway pure and simple, according to its original conception, elevated above the ground. The elemental idea of this structure of the defendants is two rails laid across the river, so narrow and so wide apart as that neither man or beast can walk over it. It has no pathway—it has no horseway—it has no wagonway—it has no roadway. If such a thing had been built in 1790, would it have been called or been a bridge of any kind whatever? If it would not, would it become so because we have *since* discovered a mode of being passed over it? The legislature of 1790 intended to give to the complainants a monopoly of the travelling over bridges, but they did not enact, nor did they intend to enact, that mankind, in the coming time, should not discover and use a mode of being passed over rivers on structures which were not bridges.

I repeat, is this proposed structure a bridge within the meaning of the term as used in the charter of 1790? What kind of a structure was in 1790 represented by the sign bridge? *It did not in 1790, or ever before or since, represent any structure or material thing which had not a footway across the stream.* Nor for the last thousand years has the term bridge, either in England or this country, represented any structure which had not a footway, a horseway, and a wagonway. The footway for man and beast is of the very essence of the bridge. It is that, with respect to bridges, without which nothing. The footway is the bridge, and the bridge is the footway. What must have been the history of civilization upon this subject? A bridge, reduced to its simplest elements, is a plank

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resting on the natural banks, furnishing a footpath—This footpath is the seminal principle of the bridge. All the rest is but growth and development. Take away the plank, and there is nothing of a bridge. The next advance would be, perhaps, a natural rock in the middle of the stream, serving as a rude pier for the ends of the planks to rest upon. Again, take away the planks, and there is nothing of the bridge. Adding the artificial pier or the artificial abutment is nothing towards a bridge. Neither are necessary. It is still the pathway that is the bridge. So when, in the progress of skill, they widen the pathway to make it a horseway, and then again widen it so that beasts may draw wagons after them, it is still the pathway that makes the bridge. So when they add handrails and balustrades, it is only to make the bridge, as we commonly say, or the pathway more secure. And so, in all its stages of development, from the rude plank to Trajan's magnificent arches over the Danube, or to Rœbling's sublime but inverted arch over the boiling chasm of Niagara, or Stevenson's rigid tubes over the wide waters of the St. Lawrence, it is the pathway only that makes the bridge. The pathway, by whatever contrivance supported, whether supported on the natural banks and rock or the strong towers of Niagara,—whatever the kind of bridge or by whatever name called, it is the pathway that makes the bridge, whether it be a floating or a flying bridge, whether of boats like that of Xerxes over the Dardanelles, or of pontoons, like that with which a modern general crosses an interposing stream, whether built upon piers or upon arches, whether suspended upon ropes or sustained by its own rigidity, whether built of wood or stone, of cast or wrought iron, whether a chain bridge or wire bridge, whether one arch or many, whether resting on piling or on solid piers, whether covered or not, whether with handrailings or balustrades or not, it is still the pathway that makes the bridge. Nor has any structure, which in its development

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stopped short of this pathway for man and beast, ever in ancient or in modern times, in any country or in any language having a synonyme for the term, been called a bridge. I have been able to find no royal charter, no act of parliament, from the time the word bridge first fell from the lips of our Anglo Saxon ancestors until the present moment, no act of the legislature in our own state or any of our sister states, from the earliest colonial records, no decision of any court, at any time or in any country whatever, no dictionary, no encyclopedia, no work on mechanical science, no scientific work specially upon bridges, where a structure without a pathway was ever denominated a bridge.

The very nature and essence of the thing forbid that there should be a bridge without a pathway. The bridge, for all time and in all countries, has been but the continuation of the ordinary roadway. The only difference between a bridge and the rest of the road is, that in the road, the pathway rests immediately on the earth, while in the bridge it does not. Whenever the pathway of the ordinary road does not rest immediately on the earth it is called a bridge, by whatever contrivance supported, whether by water, by piers, by arches, by wires, by tubes, and whether it passes over rivers or gorges, or ravines or valleys, or canals or railroads, and we can just as well have a road without a bottom as a bridge without a footway.

Although I feel that I should apologize for so doing, I will, notwithstanding, consider this question a little longer. As I have before remarked, the only arbiter of the meaning of a term is use, and the best evidence of this use is to be found—first, in the different provisions of the act of 1790; secondly, in the provisions of the different acts of parliament from early times to the present, in the royal patents for building toll bridges, in the acts of our own and other states, from works on mechanical science, from history and from tradition, and our own use

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in our own times. Let us first, examine the act in question, and ascertain if by possibility the legislature of 1790 could have deemed a structure across the Hackensack without a pathway for man or beast to be a bridge, a bridge of any kind whatever. It will be recollected that they were providing against competition by bridges. They were not providing against competition by any other mode of crossing the river. It was not providing against competition by ferries, by canals, by telegraph, by balloons, or by tunnels. The legislature were not providing against competition by structures which were not bridges. They did not intend to say that there should be no discovery of modes of passing over structures which were not bridges. When they spoke of bridges they knew what they were dealing with. They had existed for untold centuries, and they could estimate, with some degree of accuracy, what effect the grant of a monopoly would have for a hundred years, nor in this case would their calculations have been much out of the way; nor can we, even at this day, say the act was not a wise one. But they could not deal with or estimate the effects of a prohibition for an hundred years of discoveries, which would enable men to be crossed over rivers upon structures which were not bridges, as the result has proved; nor did they intend, nor am I certain that they would have had any constitutional power, thus, in order to benefit the present, to dwarf future generations, thus to mummy up, as it were, an infant nation in its swaddling clothes.

But let us return to this charter of 1790. Can it be possible, under its provisions, that any structure across the Hackensack, which had no footway, horseway, roadway, or wagonway, could have been deemed a bridge? The charter gives to the complainants the power to build a bridge over the Hackensack, but it does not prescribe what kind of a bridge it shall be; the kind is left entirely to the discretion of the complainants. Now, if the

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defendants' proposed structure be a bridge, if there can be a bridge without a footway, then it would have been competent for them to have built such a structure as that of the defendants, and insisted that they had performed the conditions of their charter. Suppose they had done so, and called the conscript fathers of that legislature to look at a couple of iron rails, without any footway, laid across the river, and told them that that was a bridge, and that it gave them an exclusive right for an hundred years to stop all passage across the river, except upon their contrivance, would not the conscript fathers aforesaid have deemed themselves mocked? If such a structure could have been deemed a bridge, would the legislature, when they were providing by act to facilitate the passage across the river, have done an act which would have barred the passage for an hundred years? We can only account for this in one way, and that is, that the term bridge, *ex vi termini*, meant a footway; and an idea that a structure without a footway could be a bridge, never was dreamed of by any one.

The title of the act is, an act for building bridges over the Passaic and Hackensack. The preamble commences—"whereas the public good will be advanced by erecting bridges over the said rivers." No kind is prescribed—any kind answers the conditions of the charter. The complainants say, two iron wires, stretched across the river, without a pathway, without a horseway, without a wagonway, is a kind of bridge. If so, it would have complied with the charter; and if so, how could, as said in the preamble, the public good have been advanced? Is it not manifest from this that the legislature, by the term bridge, could not have meant any structure which had not a footway? But again, the charter makes provision for the complainants to construct a common road or causeway from Newark to Jersey City, leading up to and from this bridge, at great expense, across the marshes. If the term bridge meant a structure without a footway

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for man or for animals carrying or drawing their burthens, it would have been a compliance with the charter, if the complainants had built such a structure as the defendants propose to build, and claimed the monopoly for an hundred years. But how is it possible to conceive that the legislature of 1790 could have meant, by the term bridge, a structure which nothing which could come by the road they were to build could by possibility cross? If the defendants' structure, if erected in 1790, would *not* have been a bridge *then*, if erected *now* it could not be, in the language of the 15th section of the complainants' charter, *any other bridge*. The legislature of 1790 knew perfectly well that, by the term bridge, *ex vi termini*, no structure like that proposed by the defendants could be imposed upon them; that no structure could be imposed upon them which was not the continuation of the ordinary roadway, which had not a footway, a horseway, a wagon-way and roadway. They knew perfectly well that, from the earliest colonial records of this and of all the other states, and for a thousand years in England, the simple term bridge stood as a sign for a structure over a river, which furnished a footpath and a horsepath so wide that man and all animals could walk over it, and draw over it all vehicles in ordinary use, and which nature had given them strength to draw. And they also equally well knew that every kind of bridge did and must furnish this footpath or it was no bridge; and all they provided against was, that it should not interfere with the navigation. But the complainants still contend that the defendants' proposed structure is a bridge.

We are asked, as if the question could not be answered, is not a railroad bridge a bridge of some kind or other? The question is best answered by asking another—is not a hippopotamus a horse, a sea lion a lion, a mermaid a maid? and if it is murder to kill a maid, is it not murder to kill a mermaid? If it is unlawful to build a bridge, is it not unlawful to build a railroad bridge? But suppose

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we call a railroad bridge a bridge, as the charter of 1790 does not prescribe the kind, they had as much right to build one kind as another, and then if the complainants, instead of building the one they did, should have built such a one as the defendants propose to build, verily the legislature would have done a prosperous business for their day and generation. With the intent to provide for the more easy passage across the river, they would have got a structure which neither man or beast could even get on, much less over, and made a valid contract with the complainants that no other bridge, no other structure upon which man or beast could cross, should be built for an hundred years. Such are the inevitable results of this charter, if in 1790 the term bridge did not mean a structure affording a pathway, a horseway, and a carriageway, or if a structure without either, a mere wire stretched across the river was a bridge, a bridge of any kind or any other bridge. So if we look at the agreement between the commissioners and the complainants, which I am treating as if it were part of the charter. The commissioners thereby grant to the complainants the said bridges to be erected, with the tolls, which are not to exceed for passing the bridge for a single person three cents, man and horse seven cents, horse and chair fifteen cents, wagon and horse and horses twenty-nine cents, wagon and four horses forty-eight cents. Through all this, do they not use the term bridge as a term convertible with footway? For horse and man passing over the bridge, what is that but walking over the footway? For horse and wagon passing over the bridge ten cents. Take away the footway, and what bridge is there to pass over? So strictly is this idea preserved, that there is no franchise of toll given for anything which does not use the footway and roadway as on the ordinary road. Thus toll is given for animals on foot and on animals drawing their burthens, but no toll is given for anything in wagons or that does not actually touch the roadway. Thus, if the wagon

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is loaded or empty, whether it has twenty passengers or none, makes no difference in the toll. If a man passes on foot he pays toll, but if in a wagon or other vehicle he pays none. And thus I might go through every clause of not only the charter of 1790 but also the supplements and the agreement. The fundamental idea in all is, that a bridge is the ordinary roadway for man and beast, and only distinguishable from it in that the ordinary roadway rests immediately on earth, while the bridge does not.

I have said that, in technical language, the term bridge has always stood for a structure that had a pathway, a horseway, a wagonway, and a roadway; that in no law paper or document was a structure which had not a footway, as its elemental idea, ever denominated purely and simply a bridge. I shall not enter into detail upon this subject. I would have to transcribe the statutes at large from the times of the great charter. I would have to transcribe the pamphlet laws of this and of all other states from the earliest records. In every general law respecting highways and bridges, in every provision for their erection or repair, in every charter for particular bridges, in every canal charter, in every railroad charter from the earliest times, no structure that has not the footpath for its elemental idea is taken for a bridge. In all it is assumed that there can be no bridge without the footway. What means, in every canal and railroad charter, the provision, that when they pass a public road or through a farm the company shall build a bridge over the canal? Does it not imply, and so has it not always universally been understood, that by the term is meant a structure with a footway? Would the defendants' proposed structure save the company from indictment for a violation of this requirement? I have considered this question as if we should be confined to the meaning of the word bridge in 1790, when it was used. I only did so to be more certain of safe reasoning. It was not necessary in the present instance. It could safely be yielded to the complainants

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to take its meaning at the present day. The term bridge, standing by itself unqualified by any other sign, still in all common parlance and in all technical language means a structure whose elemental idea is the footway. Take, for instance, the act of the legislature passed, with respect to this very river Hackensack, on the 17th of March, 1860, *Pam. Laws* 769. The act is entitled, "an act to authorize the building of a bridge over the Hackensack river," and reads as follows: "And be it enacted, that it shall be lawful for the board of chosen freeholders of the county of Bergen to build and construct a bridge across the Hackensack river at the village of Hackensack." And this is the whole act. They prescribe no form of bridge. Could the freeholders save themselves from responsibility by building a structure upon which neither man or beast could get on, much less cross over? Take the bridge now building under our eyes over the Delaware. The commissioners are authorized to build a bridge. Would they be deemed to have built a bridge if they erect a structure with no covering, no balustrades, no handrails, no floor or footway, with only two narrow iron rails stretching their grand proportions over the river, and nothing below but the rushing waters? Does this not most conclusively show that the legislature used the term bridge, as one which *ex vi termini* could not exist without the footpath? But this is only one of thousands to be found in all our pamphlet acts and in every volume of the annual laws of all our states for the last hundred years. You can hardly open a page of any of them but you will find the legislatures using the term bridge as being convertible with the term footway, as calling for a structure affording a footway and a horseway wide enough for them to walk over and draw their burthens over with them. In not one of them, in any state, or from the earliest time to the present moment, is the term bridge, or any bridge, or any other bridge, used to signify a structure which has not the footway. So, again, take up the law reports in

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England or in this country. Bridges have always, from very early times, occupied more or less the attention of the courts. Upon what indictment, in England, has it ever been a good defence, either by counties or individuals bound to build them, that a bridge was a structure that did not require a footway, a horseway, and a wagonway? The same remarks may be made of the reports of our own country. I find, indeed, in the early reports no definition of a bridge any more than I do of light, every one assuming that everybody knows perfectly well what a bridge is. It is always assumed as a footpath across a river, and to which there is no exception, not even, as I expect to show hereafter, the Enfield bridge case in 17 *Connecticut*. So again, if we pass out of the region of the law, we can collect a respectable library of works devoted exclusively to the matter of bridges; but in none can you find the slightest hint that a thing without a footway is a bridge. I shall not quote definitions from dictionaries and encyclopedias, but only remark, that they all define or assume a bridge to be a structure with a footpath.

Now bearing in mind that a bridge, by the concurrent testimony of all past time, in every possible shape and form, is but the ordinary road carried across the river, by whatever contrivance supported, what resemblance has the proposed structure of the defendants to one? Is it any continuance of the ordinary road across the river? Could any animal travelling on the ordinary road use it? What is its elemental idea? Two iron wires stretched across the river, so narrow and so wide apart as to afford no footway to man or beast. Do two wires make any difference? Is not one as good a bridge as two? Does it make any difference whether the iron wires are four feet or four miles asunder? It is true that the defendants may go on, and by laying plank across their structure, make a footpath for man and beast, and then it will, *quo ad hoc*, be a bridge. They may thus make their structure

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not only a bridge, but also a railroad bridge and a railway bridge, and by putting glass supports under the rails, also a telegraph bridge. All these structures may thus be combined in one. A short reference to the history of railways will, perhaps, best illustrate what I mean. Curiously enough, the first railroads ever built were underground railroads, *viz.* those built, in the coal mines of England, to facilitate the miners in drawing their hand-cars through the low and dark coal galleries to the foot of the shaft. The idea was soon transferred to the upper air. They were first built from the mouth of the shaft to an adjoining harbor, and were at first rudely constructed of timber rails, and drawn by animals, and so, of course, had footpaths. They were the ordinary roadways, except that rails were laid in them. These railroads crossed streams upon structures which necessarily had footpaths, and were properly denominated railroads and railroad bridges. They were roads in respect to their having the ordinary footways for beasts, and railroads in respect to the rails upon them. So structures by which they crossed streams were properly denominated railroad bridges. They were roads in respect to their being the continuation of the ordinary roadways or footpaths, and bridges in respect to their pathways not resting immediately upon the earth, and railroad bridges in respect to the rails upon them. But let the footpath disappear from this structure, and it would neither be a bridge nor a railroad, nor a railroad bridge. It would be a railway pure and simple. It would be no more a bridge than the rest of the distance would be a road, if its bottom should sink out of sight. This is the way in which it has happened that the term railroad bridge has come to be frequently applied to those mixed railroad structures, and is entirely correct when they have the footway. This use of the term has become the more common by their frequently being built in this way. So it is with the railroad bridge over the Raritan at New Brunswick, the wire bridge over

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the Niagara, and, perhaps, the Victoria bridge over the St. Lawrence. These structures are not the less bridges because they have also railroad tracks on them, or because cars and locomotives roll over them. That is not the question. The question is not, whether the structure may not be a bridge as well with as without the rails, but whether it can be a bridge without the footway. If a railroad should be laid down in Broadway, New York, it would not be less a road because of the rails and cars. But would it be a road, if the whole bottom of the street should fall out, and leave nothing but the rails and an unfathomable gulf below? It is the mixed structures to which the term railroad bridge has been generally applied, and is, as to them, perfectly correct. But I am not aware that the term railroad bridge has, except in the most loose and casual manner, been applied to a structure without a footway, to a railway pure and simple over a river. If it has, a locomotive has quite as often, and quite as consistently, been called a steam horse, and will prove as logically that a locomotive is a horse, as that a railway bridge is a bridge. Indeed, it appears to me that the steam horse is quite as much a horse as that a railway bridge is a bridge. To be sure he drinks larger draughts of water from his trough; his food is somewhat coarser; the one eats the grass of the field, the other devours the trees of the forest; his neigh is somewhat louder; his heart, as he champs upon the bit to start, is fired by an intenser heat; as the driver gives him the rein, the breath of his nostrils beclouds his pathway, and distancing at a bound his puny competitor, he shouts his challenge to the sun, as over hill and valley, over mountain and prairie, he holds on his tireless flight towards the occido-orient. But this steam horse has no feet, and his bridge wants no foot-path. The bridge is the congener of the horse, and the railway of the locomotive. The bridge presents to terrestrial animals the natural form adapted to their mode of progression; the viaduct to the powers of steam on land,

the material form adapted to its mode of progression ; the telegraph wire to electricity, the material form adapted to its mode of progression ; the water to the steam ferry, the material form adapted to its mode of progression ; the canal to the propeller, the material form adapted to its mode of progression. But all these start from different seminal principles of thought, develop themselves into entirely different forms, and have always been distinguished by different verbal signs. The horse and the steam horse are both capable of rapid motion, and that is all they have in common ; the bridge and the railway bridge are both structures across rivers, and that is all they have in common ; the railway bridge as far exceeds his rival in the peculiar manifestations of his powers as the steam horse does his rival, and yet falls as far short of the principle of the bridge as the locomotive does of the horse ; the horse has life, and the bridge has bottom ; the locomotive has no life, and the viaduct has no bottom. The bridge was made for the horse, and the viaduct for Behemoth. Take from the one its life, and it is no longer a horse ; take from the other its footpath, and it is no longer a bridge. The structure of the defendants might have stood across the Hackensack for a thousand years, and it would have stood in solitude. It would have had no comrade until the steam horse came, and then they would instinctively have known each other.

I have said that no structure over a river which had not a footway for man and beast was ever called a bridge. Such structures are very numerous, and have existed for several thousand years. Take, for instance, the Roman aqueducts, built for supplying their cities with water. They started from high altitudes, and were carried to the cities by gradually descending planes. In their course, they were dug through hills, and carried by arches over rivers and valleys. Some of them are still existing, and the remains of others are scattered over Europe and Asia, from the pillars of Hercules to the stormy Euxine. But

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they were never called *pontes*. Why not? They were structures across rivers. There were their massive abutments of solid masonry, their long *vistæ* of lofty piers and of springing arches, wide enough and strong enough to carry over them the imperial armies. What was wanted to their being bridges? Clearly only the pathway for man and animals. Put pathways on them, and they are instantly *pontes*; take them off, and they are instantly but *aquæductæ*. So take the structure alongside of the complainants' bridge carrying water into Jersey City. What is wanting to this being a bridge? It is a structure over a river—it rests upon piling. It carries merchandise into Jersey City. Why do not the complainants enjoin it, and force it to pay tolls into their coffers for every gallon of water that passes over it? The only difference between it and the proposed structure of the defendants is, that the one transports merchandise across the Hackensack by the centripetal power of gravity, the other by the centrifugal power of fire. Put a pathway on it, however, and it is instantly a bridge; take it off, and it is none. Again, who ever thinks of calling a canal viaduct a bridge? And yet why not? It has its abutments, its piers, and its arches; but its waters are no footways for man or beast.

Suppose the Morris canal had seen fit to cross the Hackensack upon piers and arches, would the complainants enjoin its canal boats and propellers under the allegation that it is a bridge? And yet why not? Would it not have everything of a bridge except that its waters are not footways? If these two heavy iron wires of the defendants across the stream are a bridge, why are not the telegraph wires a bridge? They are structures across the river, they are suspended upon piling, they do the business of the bridge. The only difference between the two wires of the defendants and the many wires of the telegraph is, that the one expresses man by steam, the other thought by lightning. Some of us are old enough to remember,

that long after this charter of 1790 was passed, but before the days of railways and telegraphs, when an arrival happened at New York, an express was started from Jersey City. Mounted on the fleetest charger that could be had, with his news in his saddle-bags, he started at full speed toward Newark. Arrived at the Hackensack, he stopped a hurried moment to pay his toll, horse and rider, and then again plunged on his headlong course towards the Passaic, rattling along the turnpike, thundering over the bridge, clattering up the pavement, his horse bathed in foam and screaming to the gathering crowds, "I come the herald of a noisy world, news from all nations." On what bridge now does he, this herald, cross the Hackensack? He stops at no bridge; he pays no toll; the contents of his budget, unheard, unseen, flies with electric speed, for weal or woe, around the earth, using the wire for his bridge, and the lightning for his courser. But why is not the telegraph wire a bridge within the argument of the complainants? It is a structure across the river for the more convenient passage of mail matter. The mail only carries signs, and so does the telegraph. Neither are ponderable, and yet both are conveyed in material matter. The telegraph bridge, like the railway bridge, detracts from the tolls of the bridge. But for it, the express horse and his rider would still have to speed it along the turnpike. Furnish a footpath to the wires, and they are instantly a bridge; but without it, transport across them what you may, by what power you may, steam or electricity, and it never can be such. The bridge is the conception of a structure adapted to the natural modes of locomotion of man and his co-terrestrials, and when we have the superb structures of Ræbling and of Stevenson, with their footpaths and rails, and cars drawn by horse power, we have the extreme limits of its growth—it has reached the highest point of development permitted to it by the inexorable law of its existence. It is necessarily limited to short distances, to slow motions, to small loads,

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and to the puny efforts of mere animal powers. But in the railway bridge and the telegraph bridge man frees the latent forces of nature, and harnesses their exhaustless powers to his car. And yet it is true that the viaduct is a structure more simple than the bridge, and the telegraph than either. But such is the law of progress. As man penetrates into the arcana of nature; as, through long series of ages, he laboriously and slowly, at infinite distance, but by infinitesimal approaches, advances himself toward the presence of Omnipotence; as results become sublime means become simple. Stone—Bronze—Iron—Bridge—Viaduct—Telegraph. That slender wire, so fragile as if the robin's tread might part it, nothing, unless insulated from earth, do we in blindness touch a chord by which Omniscience sends his mandates through the universe! The viaduct and the telegraph are no children of the bridge. They are born of thoughts mightier far than it—steam and electricity! The one, the highest type on earth of infinite power, the other of infinite speed. The railway bridge and the telegraph bridge! But bridges *only*, as the waters of the ocean are a bridge for leviathan, and the air a bridge for the eagle.

I shall now review the authorities cited upon the argument, but shall first refer to one, I believe not there cited, *viz.* that of *The Freeholders of Sussex v. Strader*, 3 *Har.* 112. It appeared, by the case, that as Strader was driving carefully over a bridge, the abutment of which was defective, one of his horses fell off, and was killed. The question was, whether the chosen freeholders or the overseers of the highways were responsible. Justice Dayton, in delivering the opinion of the court, says, "the term bridge conveys to my mind the idea of a passage way by which travellers and others are enabled to pass safely over streams and other obstructions. A structure of stone or wood, which spans the width of the stream, stretching its gaunt proportions from waters' edge to waters' edge, but which is wholly inaccessible at either

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end, whatever it may be in architecture, does not meet my ideas of what is meant in law and common parlance by a bridge." But if instead of the *abutments merely* being defective, Justice Dayton had looked upon the defendants' structure, stretching its gaunt proportions from waters' edge to waters' edge, consisting of only two wires four feet and ten inches asunder, and nothing between them, with no footway, no horseway, and no wagonway, is it not apparent that it is the last thing that would have met his ideas of a bridge? Justice Dayton then proceeds: "From the time of Leaming and Spicer, the books literally teem with enactments about roads and bridges. The legislation of the state affords many instances where companies and individuals are either bound or authorized to construct bridges, and in such cases the word bridge is used as tantamount to a complete passage way. It has never been doubted that when companies have been required to construct bridges over canals or railroads, that they were bound to fill up the ends, so as to make complete and safe passage ways for the public or the owners of adjoining land. So, too, our statutes have authorized owners of land to construct bridges over private or by-roads, over drains and ditches; and under this phraseology, it has never been doubted that the owner is bound to fill up the ends of these bridges, so far as to make them safe and convenient passage ways." White and Nevius, justices, concurred in all things with Justice Dayton. Chief Justice Hornblower says, "I fully and in all things concur in the opinion just delivered by my brother Dayton." This definition of a bridge, as contained in the opinion of Justice Dayton, has since got into the law dictionaries, Bouvier expressly founding his definition of a bridge upon it. Can any one read this opinion, and for a moment think that if the Supreme Court, in 1840, had looked upon two naked iron rails stretching their gaunt proportions from waters' edge to waters' edge, with no footway, no horseway, no wagon-

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way, and no roadway, from which a horse could not fall off, *only* because he could not get on, that they would have called it a bridge?

The next case in the order of time, and the first one cited on the argument, is that of *The Mohawk Bridge Company v. The Utica and Schenectady Railroad Company*, 6 Paige 564. This was in 1837. The railroad company were proceeding to erect their structure for the passage of railroad cars about one hundred rods above that of the Mohawk bridge, and the complainants filed their bill, stating, among other things, that the proposed railroad bridge would divert travel from the toll bridge. It will be recollected that, before this decision, the courts of New York had always held that the grant of a toll bridge franchise was by its very terms exclusive, and so in this case the Mohawk bridge had contended. It will be perceived, therefore, that for the purposes of the argument, it made no difference whether there were express words of exclusion in the grant to the bridge company or not, and therefore the Chancellor said, "the legislature have not deprived a future legislature of the right to authorize the erection of another bridge. And even if the grant had in terms given the exclusive right to erect a toll bridge, the subsequent grant to the railroad to cross the river with their railway would not have been an infringement, as the railroad bridge would not be a toll bridge within the meaning of the grant." The case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters' Reports, had not been reported when this opinion was written, as it is not referred to either in the opinion or upon the argument.

The Chancellor had, therefore, two questions directly before him: one was, whether a grant of a toll bridge was *ex vi termini* exclusive, the other was, whether a railroad bridge was a toll bridge within the meaning of the grant. If he proceeded upon the first question, he must overrule a series of decisions in New York, for which the Charles

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river bridge case had not yet led the way, and he therefore chose to put his opinion upon both grounds, holding—first, that a grant of a toll bridge was not *ex vi termini* exclusive; and in the second place, that a railroad bridge was not a toll bridge. It appears to me, therefore, that the Chancellor's opinion on this last point is not justly subject to the criticism that it was a mere *dictum*; but the question laid plainly in his path of argument, and demanded a solution, unless he was satisfied to overrule the current of previous decisions of his own state, and rest the case entirely on that. He refused the injunction, upon the ground that a railroad bridge was not a toll bridge, as well as upon the other ground.

The next case, in the order of time, is that of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. 56. This was decided in June, 1845. As this case was greatly relied on at the argument by the complainants, and some surprise expressed that it is not adverted to in the opinion of the Chancellor, I shall consider it with some particularity. The legislature of Connecticut, in 1798, had authorized the complainants to erect a bridge over the Connecticut at Enfield, with power to collect tolls for an hundred years. The charter further provided, that no person should have liberty to erect another bridge anywhere between the north line of Enfield and the south line of Windsor. In 1835, the legislature chartered the defendants, and gave them power to construct a railroad from Hartford to Springfield, and, if necessary, to build a railroad bridge over the Connecticut. The railroad having commenced to build their bridge within the forbidden limits, the bridge company applied for an injunction.

The Chief Justice, in delivering the opinion of the court, says: "The defendants claim that they have a grant to lay a railroad or way to cross the Connecticut river; that this structure over the river is part of their railway, and not a bridge, in the sense of the charter. What, then,

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is a bridge? It is a structure of wood, iron, brick, or stone, ordinarily erected over a river, brook, or lake, for the more convenient passage of persons or beasts and the transportation of baggage." Taking this definition to be entirely accurate, the misfortune is that it does not embrace the proposed structure of the Hoboken Land and Improvement Company. They propose to erect no such structure. In the first place, is the structure they propose to erect one "ordinarily erected for the more convenient passage of man and beasts." The definition evidently never was intended to refer to any such structure as the defendants propose to erect over the Hackensack. The structure ordinarily erected over a river for the more convenient passage of man and animals, is one having something man and animals may walk over, a foot-path. A bridge erected for the more convenient passage of man and beast, which had no bottom to it, which was in fact nothing more than two telegraph wires stretched across the river, would, I think, to the man and beast which came to make a more convenient passage, appear not an ordinary, but a most extraordinary structure for that purpose. But that the Chief Justice is reasoning about a very different structure from that proposed by the Hoboken company is manifest, for he immediately adds as follows: "And whether it is a wide raft of logs floating upon the water, and bound together with withes, or whether it rests on piles of wood, or stone abutments or arches, it is still a bridge." All this is true, and indeed I do not know anything that gives a better footway for man and beast than a wide raft bound together with withes. But a horse or a horse and cart, I take it, would find it a very different thing to cross the Connecticut on two telegraph wires four feet ten inches asunder. The Chief Justice then remarks: "The particular manner in which this structure is built is not described, but it is said to be much in the manner common to railroad bridges, *the bottom covered with plank*, and the sides secured by railing."

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It seems hardly worth while to proceed with our criticism of this opinion of the Chief Justice of Connecticut, after he has told us that the structure he is trying to prove to be a bridge has its bottom covered with plank. By that simple statement, he gives us a structure with a pathway, a horseway, a wagonway, and a roadway. He even adds the handrails. He can have no difficulty after this in proving his structure a bridge. But the question is, not whether it would be a bridge with its bottom covered with plank, but whether it would be one *without* it. Leave its bottom covered with plank, and it will no more cease to be a bridge because rails are laid in it, than Broadway will cease to be a street, if rails are laid in *it*. But take the bottom out of both, and the Chief Justice's structure will no more be a bridge than Broadway will be a street. The structure the Hoboken company propose to build is precisely the opposite of that about which the Chief Justice is reasoning. The one has a bottom, the other has not. The Chief Justice then again proceeds—"It is a matter of notoriety that railroad bridges are built upon solid abutments of mason work, and resting on piers of stone between the abutments, thus giving security and strength to the frame above." And he adds—"It is not easy to see wherein such a structure differs from an ordinary bridge, except that, as it is to endure a greater burthen, it is more solid and substantial." Nor, as I frankly confess, can I, with its solid foundation and its bottom covered with plank! The brethren of the bridge, with the sovereign pontiff (Pontifex Maximus) at their head, could not have built a better. But the question is, if the learned Chief Justice of Connecticut had stripped the plank from off the bottom, and undertaken to walk, Blondin like, upon one of these iron ropes over the dizzy waters, whether he would *then* have seen no difference, and would have said judicially, that *that* was a structure ordinarily erected over a river for the more convenient passage of men and animals. The Chief Justice then

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proceeds—"It would seem, therefore, as if this was what would be ordinarily called a bridge." He need not have qualified the sentence with a "seem." There was nothing ever more absolutely certain than that a structure upon piers and abutments, with a pathway of solid plank resting on them, is a bridge. The Chief Justice then proceeds as if not yet certain that a roadway resting upon solid piers is a bridge, and remarks—"But we agree with the defendants' counsel that it is not the name that is sufficient to designate it." Here he recognises the principle we have before enunciated, that the calling a structure a railroad bridge will not make it a bridge, any more than calling a locomotive a steam horse will make it a horse.

He then again proceeds—"We must then consider the object. What was the intent of this structure?" I had supposed that this was a question of essential structure, a question what material thing was represented by the sign bridge, and I confess I am unable to see how the object and intent with which a man builds a thing can make it either a bridge or a horse. But the Chief Justice, nevertheless, answers his own question himself, and thus gives us its object and intent: "The safe and expeditious passage of persons, whether from greater or less distances, over the stream, in the cars or carriages provided for that purpose, together with all baggage or freight intrusted to the care of the company." Now that he correctly states the object of the railroad structure is most true; but that a bridge ever had such an object or intent I have first learned from his enunciation. Will any one produce an instance? *When*, where, in what country, in what age, in what case in England, where tolls are sometimes attached to the servitude to build, in what act of parliament, in what charter of the crown, in what act of incorporation in this country, in what bridge built by state, county, or private person or public corporations, was ever the safe and expeditious passage of persons over the stream in the

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cars provided for that purpose, together with all baggage or freight, intrusted to the care of the company, the object and intent of a bridge. On the contrary, it is just this object and intent which bridge builders never could have had. Who ever heard of a bridge owner furnishing or being obliged to furnish cars or carriages to transport passengers and freight across his bridge? It involves loading and unloading freight and passengers on each side of the river, and the whole idea is incongruous with this mode of structure. But there is no case I have seen (the proprietors of the bridges over the Passaic and Hackensack certainly cannot) where bridge builders can charge for freight and passengers so transported. They are not among the things to which tolls attach; so that if the intent and object of a bridge be as supposed by the Chief Justice, those who build bridges for the public use must have the benevolent object and intent to build them at their own cost for nothing, and provide the cars and motive power extra and gratis. The Chief Justice has fallen into this expression by not adverting to the different senses in which the word passage is used in reference to crossing a stream. Wherever, in the dictionaries or encyclopedias, or in statutes, the word passage is used in reference to a bridge, it is used in its active sense, as when a man walks over a bridge he is said to pass over a bridge, and is called a footpassenger; when the term passage is used in crossing a river upon a structure not a bridge, the term is used in its passive sense, as when a man passes over the ocean to Europe in a ship, or if he crosses over a river in a canal boat, or in a ferry boat or a railroad car. In all these cases it is called a passage, but the term is then used in its passive sense. If he or any other animal goes over a bridge, he goes by his own powers of locomotion; if he goes on a boat or a railroad car, he is carried by others. A want of advertence to this distinction has caused, I apprehend, much of the confusion upon this subject. The Chief Justice, again speak-

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ing of the railroad structure, says: "It may not, and it is not intended to accomplish all the objects of a common bridge, as it is not adapted to the common vehicles in use;" but, he adds, "can that fact change its character as a bridge?" It is apparent that the Chief Justice has gone on with his reasoning until he has forgotten his own definition. He had just before told us that a bridge was a "structure *ordinarily* erected over a river for the more convenient passage of persons or beasts and the transportation of baggage." How a structure not adapted to the common vehicles in use can be one *ordinarily* erected over a stream for the more convenient passage of persons, is more than I can see, and is a fact which I have never observed. But the Chief Justice asks the question as if it was conclusive upon this point, "Can the fact that the structure is not adapted to common vehicles change its character as a bridge?" I answer, most certainly not. If it is a bridge at all, no fact can change its character as a bridge. In pursuing his argument, he next remarks, "A bridge adapted only to footpassengers would be still a bridge." A bridge adapted only to footpassengers is undoubtedly a bridge, and was probably the first one ever built. But how it follows, that because a structure adapted to only footpassengers is a bridge, that therefore a structure upon which a footpassenger can neither get, stand, or walk, is a bridge, is a sequence which I cannot see. The Chief Justice proceeds: "And it would hardly be claimed that such a bridge, to wit, one with a footpath, might be erected by the side of the plaintiffs' under the provisions of their act." In this I entirely concur. But the Hoboken Land and Improvement Company propose to erect no such footway; and if they do, they will, under the assumptions I am considering this case, become responsible.

The Chief Justice then remarks: "We find, then, this structure, with the form of a bridge, with the name of a bridge, with the character of a bridge, and doing the

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work of a bridge; we cannot, then, but conclude that it is a bridge." This may all be very good logic as applied to the structure the Chief Justice has built in his own contemplation; but it has no application whatever to the proposed structure of the defendants in this cause. A structure without a footpath for man and beast has neither the form of a bridge, the name of a bridge, the character of a bridge, nor does it do nor *can* it do the work of a bridge. As to its form, no bridge was ever built that had no bottom to it. Two wires stretched across the stream has not a single characteristic of the form of a bridge. It is no more a bridge than a sieve is a pail—the one will no more carry passengers than the other will carry water; nor, as we have seen, had such a structure ever the name of a bridge. I do not know if I understand exactly what the Chief Justice means by the character of a bridge, but I have never learned that two wires stretched across a stream without any pathway for man or beast ever enjoyed such a reputation. Nor can such a structure by possibility do any of the business of a bridge. What business that a bridge ever did in all time past can by possibility pass over or be done upon the proposed structure of the defendants? The only business of a bridge is the passage of men and animals upon its footpath drawing the ordinary vehicles. This the defendants' structure cannot do. Nor can the bridge do the business of this viaduct—and if it did, it could charge no toll for it. This structure of the defendants does the business of the bridge only in the way a ferry or canal boat would do it. It bears more resemblance to the ferry than the bridge. In the ferry the passenger is buoyed up by the boat, in the viaduct by the rails, on the bridge by the footpath. On the bridge he passes over by his own active motions; on the viaduct and the ferry he is passed over in the boat or car of the company. The ferry boat is kept to its course by the helm, and the car by its flanges. It is true a man may pass over the bridge in an

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omnibus, but then he is an omnibus, and not a bridge passenger. The bridge toll is the same if there be one or twenty passengers in the omnibus; the toll charge is for using the footway. We cannot, then, but conclude that the proposed structure of the defendants is not a bridge. The result in Connecticut was *en rapport* with the reasoning. The court enjoined the *railway* bridge, not because it had *rails* upon it, but because it had a *footpath* upon it. I conclude that this case in 17 *Connecticut* proves nothing. The structure about which the court reasoned being one the very reverse of that the defendants in this case propose to erect.

The next case in order cited on the argument is that of *Thompson v. The New York and Harlem Railroad*, 3 *Sand. Ch. R.* 625. This was in 1846, one year after the preceding case, but which is not referred to, it being then not yet printed. This last case was this: the legislature of New York, on the 31st of March, 1790, gave to Lewis Morris the right to build a bridge across Harlem river; and by the same act it was provided that it should not be lawful for any person whatsoever to erect any other bridge over said river, except for the private use of the inhabitants of the townships of Harlem and Morrisania. Morris erected the bridge, and his rights were held by the complainant. It will be observed that this act was only a few months before the one of the complainants in this cause, and is identical in language, as if the one had been copied from the other. In 1837, the inhabitants, under the above reservation in their favor, built a new bridge over the Harlem, and on the 10th — 1840, sold it to the defendants, reserving to the inhabitants of Morrisania their rights. The defendants, having a legislative grant to build a railroad bridge over the Harlem, laid the track of their railway on the floor of this bridge, and it became a part of their railroad from New York to Westchester. The bill was to enjoin the railroad company from using it for their cars, upon the allegation that such use in-

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fringed the franchise given to Lewis Morris in 1790. The Vice Chancellor refused to restrain the defendants from using their structure as a railroad bridge. It was said here, upon the argument, that the Vice Chancellor put the case upon the ground that no exclusive right was given. It does not appear to me that it is obnoxious to this criticism. The Vice Chancellor does indeed say *arguendo*, "that the legislature do not declare that they will not permit another bridge to be erected," meaning merely that although the legislature say that it shall not *now* be lawful to erect a bridge, yet they do not say that they will not make it lawful *hereafter*. But the language of that exclusive grant is identical with that now before the court, and the Vice Chancellor goes on afterwards, and meets the whole case. He finally put the case expressly upon the ground that "the progressive spirit of the age had developed and matured a mode of conveying passengers and freights from place to place across rivers which was unknown in 1790." This could hardly be said if he had deemed the defendants' structure a bridge. The next case in the order of time is that of *McRee v. The Wilmington and Raleigh Railroad Company*, 2 Jones' Law R. 186. This was so late as 1855. The legislature of North Carolina, in 1766, authorized one Harren to build a bridge over Cape Fear river, and provided therein that it "should not be lawful for any person whatever to build any bridge within six miles of the same." The defendants pleaded that they had a charter to build a railroad over this tract of country, and that they erected the bridge complained of as part of their road. It has been objected to in this case that the court put it upon their bill of rights. I think, however, a careful examination will show that this was not exactly so. The North Carolina court appears to have been puzzled in the first place as we have been puzzled, with a syllogism. The complainants' counsel argued thus: The legislature have prohibited the building of any other bridge; a railroad bridge is a bridge: therefore a

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railroad bridge is prohibited. The syllogism being perfect, the court at first appear to have got a little excited at the audacity of the pretension, and said "it was unreasonable;" but being too good logicians not to see that that was no answer, they returned, determined to attack the syllogism in due form. Their first assault was upon its first member. They said the prohibition against building any other bridge was against their declaration of rights. But here again, as lawyers, not seeing very clearly how a man could get rid of an honest contract by a mere declaration of his rights, with true southern gallantry, they again return to the charge, determined this time to bring their logical batteries to bear upon the second member of the syllogism, *viz.* that a railroad bridge is a bridge, and to attack the enemy with his own weapons. The final result was pronounced in the following words: "We are not now to decide whether the franchise or monopoly was entirely abolished by the declaration of rights. It may be that the franchise still exists, possibly so far as to prevent any other person from setting any person or thing over the river in the way of an ordinary bridge. That is a different question. *We decide now*, that notwithstanding the exclusive grant, the legislature had the power to grant to the defendants the right to construct a railroad, and in so doing to cross Cape Fear river, and consider '*the transit*' over the river as a part of their road." And so the plaintiffs lost their case because the court persisted in calling a railroad bridge a *transit* instead of a bridge, and had, consequently, to suffer a nonsuit; so that this case is not justly obnoxious to the criticism that it was decided upon their bill of rights. On the contrary, the court put their decision expressly upon the ground that the railroad bridge was no bridge, but only "a transit." Their decision was, that that railroad structure, however called, was no bridge. The next case having reference to the term bridge, but which was not cited on the argument, is that of *Tolland v. Willington*, 26 Conn. 578, in

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which Judge Ellsworth, in delivering the opinion of the court, says, "a bridge is considered to be a pathway for travelling over a stream of water." He also cites with approbation the case of *The Freeholders of Sussex v. Strader*, 3 Har. 108, and also the definition in Brand's Encyclopedia, which defined a bridge to be "a structure for the purpose of connecting the opposite banks of a river by means of certain materials forming a roadway from one side to the other." The only other case I shall refer to, which also was not cited on the argument, is that of *The Cheshire Railroad* ads. 1 *Foster's (N. H.) Rep.*

29. This was in 1850. The legislature of New Hampshire, in 1783, granted to Enoch Hale the exclusive right of building a bridge over the Connecticut, within certain limits, and of receiving tolls thereon. The bill was filed by those holding Hale's rights against the defendants, to restrain them from building their railroad bridge within the prohibited limits, and the question was whether that was a good defence; and the court, although they, as well as the counsel, reasoned very loosely upon the subject, decided "that the specific differences between the two structures might be so great that the one might not be considered as infringing upon the province of the other." So that all the authorities, whether cited on the argument or which I have met with otherwise, look to nothing as a bridge which has no footway.

Thirdly. But suppose this structure of the defendants will be a bridge within the meaning of the act of 1790, would it interfere with any of the franchises of the complainants? The ground upon which the injunction is allowed, if allowed at all, would be, that the complainants' franchises are property, and that the defendants sought to condemn them without compensation.

The franchises of the complainants are to build a bridge over the Hackensack, use it themselves, and collect tolls from others, and prevent anybody else interfering with these tolls by building any other bridge. The complain-

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ants' franchise of building a bridge is not proposed to be interfered with nor the free use of it by themselves. If there is any interference, it must be by diminishing their tolls by means of the bridge to be erected by the defendants. The franchise of the complainants is to collect tolls of men and beasts, when they pass over the bridge, also of beasts, when they draw burthens after them. But suppose the defendants should come with their locomotives and cars to go over the complainants' bridge, there is no franchise to collect tolls of them. If they should come with a car drawn by one horse, they could demand ten cents toll. But they have no franchise to demand toll if it comes with a locomotive, unless they make the same syllogism with respect to the locomotive that they do with the bridge, viz. as follows: the complainants have a franchise to charge toll on a horse; a steam horse is a horse, therefore they have a franchise to charge toll on a steam horse. Passengers in the cars cannot be charged any more than if they had passed in an omnibus, and it is the same with freight. The defendants' franchise is to collect tolls from passengers and freights passing in their cars, so that the franchises of the plaintiffs and defendants are entirely distinct. The plaintiffs have no franchise to collect toll on anything that passes or can pass on the defendants' structure. This question was discussed and decided in the case of *Thompson v. The Harlem Railroad*, above cited. The same point was ruled the same way in *The Stourbridge Canal Company v. Whaley*, 2 Barn. & Ad. 792, and in the case of *Perrine v. The Chesapeake and Delaware Canal*, 9 Howard 192.

But, again, all legislation in England and in this country has always proceeded upon the assumption, that the right to build a bridge and the right to build a railroad or a railway bridge are different and distinct franchises, and everybody has always acquiesced in the distinction. Who would or has even *thought* of building a railroad bridge under a franchise to build a bridge, or *vice*

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versa? or to build a road under a franchise to build a railroad, or *vice versa?* No terms have ever been kept in all legal language more distinct, and better practically understood, than a road and a railroad, or than a bridge and a railroad bridge, and much more is a *railway* bridge pure and simple an entirely different thing from either.

But it has been contended that, whether the complainants have any rights or not, whether any franchise of theirs is proposed to be taken or not, that the defendants are bound to have commissioners appointed to determine whether the defendants wish to take any franchise of the complainants, what that franchise is and what it is worth, and that this court should enjoin them until they do so. This is claimed under the 1st, 5th, and 6th sections of the defendants' charter, *Pam. Laws 1860, page 213*. By said first section it is enacted, that the defendants shall have power to build a railroad from Hoboken to Newark, with power to erect the necessary viaduct over the Hackensack river, reserving to the complainants their right of compensation under the 5th and 6th sections of the act. By the 5th section it is provided, that if the defendants fail to agree with any corporation owning or *claiming* to own any franchise, application shall be made in writing, by the defendants, for the appointment of commissioners, who shall examine into the matter, and report what (if any exist) franchises are necessary to be taken; that such application shall be made to the Chief Justice, setting forth what corporations the defendants are informed claim some franchise for which compensation may be asked; which commissioners shall meet and proceed to view and examine the matter, and report in writing what (if any exist) franchises are necessary to be taken, and make a just assessment of the value of (if any exists) the franchise so necessary to be taken, and assessment of the damages for the same.

Now the first section does not except from the defendants' grant the power to build a viaduct, unless

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upon the payment to the complainants of the value of their bridge, but only the complainants' right to compensation under the 5th and 6th sections of the defendants' act. We, of course, must refer to these sections to see what these rights are. Upon such reference, we perceive that those rights are compensations only for franchises *taken*, not for franchises merely *claimed*. To come, therefore, within the reservations of the 5th and 6th sections, the complainants must show a franchise taken, or, in other words, must show that this viaduct is a bridge, and that they themselves have a franchise to charge tolls on passengers and freight in cars drawn over structures which are not bridges; therefore this question is not affected, one way or the other, by this reservation in the first section.

But the complainants contend, in the next place, that, by the 5th section of the act, whenever the defendants are informed that some corporation *claim* some franchise for which compensations may be asked, they shall apply for commissioners to examine the matter, and report what franchise is necessary to be taken, and its value, and that unless they do so in every case of claim this court will enjoin them. It is apparent, from the whole scope of these 5th and 6th sections, that their only object was to give power to condemn franchises which the defendants wanted to take, and to restrain them from taking more than was necessary, and *not* to enable the complainants to force the defendants to take their franchises, whether the defendants wanted them or not. Here the defendants do not wish to condemn any of the complainants' franchises. They do not want them at all. If they should want them, they are authorized to take them in the mode prescribed in their charter, and *then* they must call the commissioners; but until they do so want them, it was not the intent of the charter to force them to do so. It is true, that if the defendants undertake to infringe upon or use the complainants' franchises without a compensation *this*

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court may restrain them, but then it will be under a *right* shown by the complainants to the franchise the defendants propose to use, and not to a mere *claim* to the franchise.

What would be the result if we should, when it is apparent to us that the complainants have no franchise which the defendants propose to use, enjoin the defendants? It is manifest that the defendants never could build their road, however clear their right to do so might be. It is as easy for one person to make a false claim as another; and as soon as the commissioners and the jury on appeal have disposed of one, another may be started, and so on *ad infinitum*. And every false claim must be alike protected under the wings of the Court of Chancery; and the time of this court would be occupied in forcing one person to take property, who admits that he does not *want* it, in order to compel him to pay its value to another, who admits that he does not *own* it.

I am of the opinion—first, that the proposed structure of the defendants is no bridge of any kind whatever as the term bridge is used in the charter of 1790; and secondly, that if it were such bridge, that the franchises given to the defendants by the act of 1860 are entirely different franchises from those given to the complainants in their charter of 1790; that the railway franchise given by the act of 1860 to the defendants is no more a bridge franchise than it would be a steam ferry franchise, a canal franchise, or a telegraph franchise, and that the decree of the Chancellor should be affirmed.

OGDEN, J. A chronological statement of the statutes from which the parties derive their rights, with particular references to the sections thereof relied on by them, respectively, are necessary for an intelligent determination of the points in issue in this cause.

On the 24th of November, 1790, the Council and General Assembly of this state, for the purpose of advancing

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the public good by the substitution of bridges for the then existing ferries, as declared in the preamble, passed "an act for building bridges over the rivers Passaic and Hackensack, and for other purposes therein mentioned."

By the first section thereof, five persons were appointed a board of commissioners, "fully authorized and empowered to put into execution the several services intended by the act." By the third and fourth sections, the commissioners were authorized to erect, or cause to be erected, a bridge over the Passaic river and a bridge over the Hackensack river, at places within specified limits, that might seem to them "most suitable and convenient for the purpose, having due regard to private property as well as to the public good."

The 10th section provides, that the bridges so to be erected shall be and thereafter remain toll bridges: and it empowers the commissioners to let the bridges to farm to other persons to be erected and made, and afterwards to be kept in good repair and maintained by the toll arising therefrom; and it authorizes the commissioners or persons farming or having care of the bridges, or either of them, to demand and receive toll within such fixed rates as the commissioners should appoint and direct in writing should be paid from all persons passing over the same.

The 11th and 12th sections provide that, "in order the better to carry into execution the ends proposed by the act," the commissioners should have power, at their discretion, to contract and agree with any person or persons, who would undertake the same for the tolls, or for so many years, and upon such conditions as to them should appear expedient; and when such a contract should be signed, sealed, and delivered in conformity with the act, that it should be so binding upon the state, and as effective to all intents and purposes whatsoever as if it had been particularly and expressly set forth and enacted in the law.

By the 15th section it is enacted, "that it shall not be

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lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river Passaic, at any place or places between the mouth of the said Passaic river and the place where the brook commonly called Second river now empties itself into the said river Passaic; nor shall it be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river Hackensack at any place or places between the mouth of the said Hackensack river and the place where Kingsland's creek empties and discharges its waters into the said river Hackensack."

Each bridge is declared, by the 17th section, to be a public highway for all people of the United States to pass over on the payment of the rates; and it is therein required that after a bridge should be erected, good attendance should be given at all times at the same; and that every and all person or persons should be suffered, with their goods and chattels, to pass peaceably and quietly unmolested over the bridge, having first paid the prescribed toll.

In the concluding proviso of the last section of the bill, it is enacted that the bridges to be built by virtue of the act shall continue the property of the persons therein mentioned, their executors, administrators, or assigns, for the term of twenty-nine years from the time of passing the act, and no longer.

The commissioners, under the provisions contained in the 11th section of the act, which were merely auxiliary to the main design thereof, on the 19th of February, 1793, made and executed with certain individuals, under hands and seals, a contract for constructing and maintaining the two bridges, and thereby did vest in the said farmers or grantees the powers and privileges which were conferred upon the commissioners for erecting bridges of a peculiar construction and description, together with the right of taking certain fixed tolls thereon; to have and to hold

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the said bridges, with their respective tolls and profits, to them and their representatives for the term of ninety-seven years.

On the 5th of November, 1794, upon the petition of the said farmers, the legislature extended the time for completing the bridges for the term of six months beyond the limit fixed in the original act.

By an act passed on the 7th of March, 1797, after a bridge had been erected over each of the rivers, the grantees and their assigns (called stockholders for building the bridges) were created and constituted a body politic and corporate, for the term that they were entitled to hold the said bridges, by the name of "the Proprietors of the Bridges over the rivers Passaic and Hackensack;" and the stockholders thereof have since that date conducted their business in the corporate name. The charter of incorporation created no additional powers or privileges which can affect the questions presented on the bill and answer in this case.

There cannot be a doubt, upon a fair reading and construction of the 12th section of the act of 1790, but that the contract or lease entered into by the commissioners with the parties thereto of the second part was as valid and binding on the state of New Jersey as if it had been particularly and expressly set forth in the law itself, and been enacted as a part thereof.

The complainants thus becoming, on the 7th of March, 1797, and thence continuing in their corporate capacity, the parties beneficially interested in and entitled to the enjoyment of the rights and franchises granted by the commissioners to Samuel Ogden and others, they are in a position to hold the state of New Jersey to an observance of the contract thus made by the commissioners under their authority, and to claim the protection of the constitution against its obligation being impaired by any subsequent legislation.

Before proceeding further in the historical statement,

it is important to ascertain the duties prescribed and the powers, rights, and franchises vested by the act of 1790, and the contract made in conformity with its provisions. The paramount object of the act clearly was the advancement of the public convenience of travel, by the substitution of bridges for ferries over the two rivers; and the duty imposed by the commissioners upon their grantees, and their representatives and successors, was the erecting and maintaining a bridge of peculiar construction over each of those rivers, suitable for the accommodation of the ordinary means of transit between Newark and Hudson's river, known and used or contemplated at the time.

No individuals would then be expected to undertake the construction of such public facilities at their own expense without having the prospect of a remunerating benefit; and hence, as an inducement for wealthy men to undertake the needed improvement, the legislature offered to capitalists the right of demanding and taking toll, and guarantied the continuance of that right for the period of ninety-nine years; and they contracted to protect the enjoyment of it by excluding, in express terms, all interference within fixed distances on each river. The obligation between the state and those who might accept its proffered terms was mutual; the one, to provide and maintain specific facilities for accommodating the public, at all times, with convenient and unmolested passages over each of the rivers; the other, in consideration of the duty assumed, to secure, as a recompense therefor, a toll from persons using the bridges, and to protect the right of exacting it, by forbidding all erections which would be calculated prejudicially to draw away the custom from which the benefit was to be derived. Grants of this nature should be so construed as to save the holders of the estate in them from such contiguous competition as would *operate fraudulently on the grant*. Such is the doctrine of the common law; and the American practice of exclud-

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ing by legislation all interference within specified distances is in affirmance of the common law principle.

There are three distinct features in this act for building the bridges: *First*, a grant of a power coupled with the imposition of an expensive duty—the erection of the two bridges. *Second*, a grant of a franchise—the privilege of exacting toll from travellers. *Third*, a guarantee of the unmolested enjoyment of the franchise for the period of ninety-nine years, by providing that it should not be lawful for any person whatsoever to erect any other bridge over or across either of the said rivers within fixed limits. The power of building and maintaining the bridges is not a franchise, nor is the prohibition of other bridges a franchise. The only *franchise* in the grant is a right to demand and receive toll from all persons who should pass over the bridges required to be erected during the period that they were to continue to be private property. None of the subsequent acts of the legislature, respecting the bridge company and other incorporated companies, have changed the nature of that *franchise*; nor have the grantees from the commissioners, or their assigns, or the complainants themselves, as a corporation, by acts either of omission or commission, impaired any of the original privileges. In the language of the Chancellor, which expresses my views better than any words would that I could select for myself, I am prepared to say, that “I entertain no doubt that all the rights and privileges conferred by the act of 1790 passed under the contract of the commissioners to their lessees, not by the terms of the contract, but by force and operation of the law itself; that they continued in the company under their act of incorporation; and that they are now, for aught that appears in this case, in the complainants as fully and effectually as they were originally conferred by the act, except so far as they have been parted with by the voluntary act of the corporation.”

In further investigating this case, it is important that

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we preserve a clear notion of the distinction between the bridges, which are permanent and substantial objects of sense, and the right to take toll, which is a contingency springing out of the bridges, and supported by them. If we confound together the profits produced and the substantial thing which produces them, we will lose the proper idea of *franchises*, and may fall short in applying to this case the law which regulates *their* enjoyment.

Having shown that, by a valid contract with the state, which cannot constitutionally be impaired, the complainants have the right of maintaining one bridge over each of the rivers Hackensack and Passaic until the year 1889, and the exclusive franchise of taking such tolls thereon as are fixed and specified in their grant from the commissioners, it remains for us to inquire whether the bill and answer show that the defendants are attempting to violate any of the vested rights of the complainants.

The bill states, that by virtue of an act of the legislature, approved on the 8th of March, 1860, the defendants are about constructing a railroad from Hoboken to the city of Newark; and that, on the 15th of May last, they determined upon a part of the route and location of their road, and have deposited a survey thereof in the office of the secretary of state; and that the survey describes the route as crossing the Hackensack river, between its mouth and the place where Kingsland's creek empties into the said river, and within the limits designated in the 15th section of the act of 1790; and that, without obtaining any consent therefor from the complainants, or paying or tendering to them any compensation or damages for the violation of the contract, the defendants have commenced building a bridge on the eastern shore of the Hackensack river; and as the complainants are informed and believe, they intend to proceed and complete the bridge across the river on the located route, and to use the same, and permit it to be used, for the transportation of passengers and merchandise, as a part of their railroad from Newark to

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Hoboken. It is further charged in the bill, that the large revenue and income which the complainants derive from tolls received at their bridges from the travelling over them between Newark and Hoboken will be much lessened by *such travel* passing over the bridge which the defendants are building, and that they will be greatly injured by the bridge and the erection thereof. The complainants pray for an injunction to restrain the defendants from erecting or maintaining the said bridge, or any other bridge, across the Hackensack, at any place within the limits specified in the act of 1790, until the 24th of November, 1889.

The defendants admit, in their answer, that they are proceeding to locate and construct a railroad from Hoboken to Newark; and they justify their acts under powers conferred upon them in the statute of March, 1860, referred to by the complainants, entitled, "A further supplement to an act to incorporate the Hoboken Land and Improvement Company," &c. The act authorizes and empowers them to survey, lay out, and construct, maintain and operate, a railroad from some point, at or near the Hoboken ferry, to such point or points in the city of Newark as they may deem best calculated to *facilitate the public travel to said ferry*; with power to erect and maintain the necessary viaducts over the Hackensack and Passaic rivers, and to acquire by contract, if the same can be accomplished, or if that cannot be done, then to take and appropriate, use, and exercise so much of all rights, privileges, franchises, property, and bridges or viaducts, or such parts thereof as may be necessary to enable the company to construct said railroad and branches; first making, or causing to be made, compensation in the following manner, to wit: if they shall fail to agree with the person or persons, corporation or corporations, claiming to own or owning any right, privilege, franchise, or property, for the exercise, use, appropriation, or purchase thereof, or so much thereof as shall be necessary to carry out the

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objects of the act, and to construct, maintain, and operate the railroad, its spurs and branches ; or if, from any other cause, no such agreement shall be made, application shall be made in writing by the company to the Chief Justice for the appointment of commissioners to examine into the matter. The report of the commissioners made in conformity with the act, or in case of an appeal, the verdict of the jury and judgment of the Supreme Court thereon, (the appraisement, assessment, valuation, and damages being first paid or deposited in court) shall at all times be considered as plenary evidence of the right of the company to take, have, hold, use, occupy, possess, exercise, appropriate, and enjoy, so much and such parts of said rights, privileges, franchises, and property so necessary to be taken, appropriated, exercised, or used, and so compensated for. The defendants also admit that they are driving piles on the eastern shore of the Hackensack river on the located route ; and they aver that they intend to proceed and complete the railroad across the river on the route, and to use it, and permit it to be used, for the transportation of passengers and merchandise over the same, as a part of their railroad from Newark to Hoboken ; but they deny that they intend to use it for any other purpose, or to allow to pass thereon, across the river, any vehicles or carriages, or anything for the conveyance of goods, merchandise, or passengers, which were known or in use in 1790, or at the time the complainants were incorporated ; and they state, that it will be impossible for any vehicle or animal, which can cross upon the bridge of the complainants, to cross the river upon the railroad of the defendants ; and that no foot passenger can cross the same with safety ; and that it is not intended for the passage of foot passengers ; but that it will be so constructed as to have iron rails laid thereon, upon which engines, propelled by steam, with railroad cars, may be moved ; and that it will not be connected with the shore on either side of the river, except by a piece of timber

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under each rail; and that the structure must necessarily be made in such manner as to make it impossible for man or beast to cross the river upon the same, except in the railroad cars; and that they intend so to construct it, that no vehicles can cross it except locomotive engines and railroad cars, resting and necessarily running on iron rails, and which cannot move upon the bridge over the Hackensack which the complainants have erected, and also in such manner that no foot passenger can cross the river on their said railroad viaduct.

The defendants admit that the complainants have not given them any consent for the erection of the structure which they have so commenced; and also, that they have not paid or tendered to the complainants any compensation or damages for the pretended violation of any exclusive right or monopoly; but they charge that the complainants have no such franchise, which has been taken or appropriated, or is to be taken or appropriated, that requires the defendants to pay or tender compensation or damages.

The question raised in this part of the case is, whether the defendants are violating any of the complainants' rights, without first obtaining their consent or making compensation, by commencing and continuing to erect, on the located line of their railroad between Newark and Hoboken, the structure or viaduct which is complained of in the bill.

The language of the 15th section of the statute of 1790 declares, that it shall not be lawful for *any person* whatsoever to erect any other bridges over the two rivers within specified distances. This is a prohibition upon the complainants as well as upon other parties. They were only authorized to erect and maintain the bridges then contemplated in the act. They could not have constructed a bridge over either river for the use of the New Jersey Railroad Company or for any other company, nor could they grant a *right* to any person or corporation to erect a

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bridge. That power remained in the sovereign people, restrained in its exercise to legislative authorizations only of such structures as will not be impaired by the *franchise* granted in the act of 1790, and now held by the complainants. This restraint upon the legislative power should not be so construed as to secure to the complainants greater immunity in the enjoyment of their franchise and property than is possessed by other parties in the state, or to protect them from the effects of a constitutional exercise of the power of eminent domain.

If the terms of the grant are to be ascertained *only by the words*, a structure over either river in the form of a bridge for sustaining water pipes or for the passage of a canal with a towing path could not be authorized by law. The legislature did not contemplate such a construction of their language. It is inconsistent with the subject they were dealing with, and unnecessary for effecting the special objects of their grant. Seeing, then, that the complainants have not the monopoly of *building* bridges over the two rivers, it becomes important for us to ascertain whether they have the right, under their grant, to adapt their present bridge over the Hackensack river to ordinary railroad travel by laying down iron rails, and providing upon it such other appliances as are necessary for permitting locomotive engines and trains of cars to pass freely and unmolested over the same. Such could not have been within the contemplation of the commissioners who acted in behalf of the legislature, when they required that the bridges should be constructed upon the principles of the bridge over the Charles river, between Boston and Charlestown, and of the width of thirty-two feet. Nor was such construction given to the grant by the legislature in 1832, in a proviso to the 10th section of the act incorporating the New Jersey Railroad and Transportation Company. After empowering that railroad company to purchase the turnpike roads and bridges on their route, they provide for continuing and protecting the use of

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them to the public, by enacting that the Newark turnpike and the bridges over the rivers Hackensack, Passaic, and Raritan, and road, shall be preserved without obstruction as public roads as *theretofore*, subject to the provisions of their several charters.

But admitting that the complainants have the *right* to accommodate their bridges to the exigencies of railroad travel, are they required so to do? Certainly not, unless their *franchise* of taking toll extends to that mode of travelling.

In 6 *Manning & Granger*, p. 229, in the case of *The Portsmouth Bridge Company*, where a question arose as to what was tollable property, Tindall, C. J., said, "Whoever seeks to impose tolls must support his claim by plain words." None of the subjects of toll contained in the rates which are incorporated in the contract made by the commissioners will include a locomotive engine or a train of passenger or freight cars. Each of the travellers inside the cars cannot be rated as a single person, because that item in the rates fixed by the commissioners manifestly was intended for footpassengers; nor could a tariff be fixed upon the motive power, and the cars and passengers in them, under the concluding clause of "*other articles not enumerated*," which follows in the section after calves, sheep, and hogs. If, then, we seek to settle the true construction of the clause of exclusion, by applying to it the ordinary rules of interpretation, we find that the context, the subject of the grant and the spirit and reason of the law, leads us to the conclusion that the legislature, in assaying to provide for a pressing public want by securing the erection of bridges upon a great line of highway, also insured to the lessees or proprietors thereof, by granting to them the franchise of toll, all the profits which could be derived from the transit of persons and property across the said rivers, over bridges to be used as ordinary public highways, within the prescribed limits, and by methods then known and understood.

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As has already been shown, the *franchise* of the complainants is the privilege of exacting toll for crossing the rivers and bridges. No such franchise is granted to the defendants in their supplement; nor do they, in constructing their railroad, require the appropriation, use, or exercise of this franchise of the complainants, or of any part thereof. When the viaduct shall be completed it will become a part of a continuous line of railroad from Newark to Hoboken, having no greater productive value than so many lineal feet of the track constructed on the salt meadows. The defendants, in their answer say, that it is not to be a passage whereby parties may escape paying toll on the complainants' bridge. Grant that the New Jersey Railroad and Transportation Company, by an agreement with the complainants, were permitted by them, for valuable considerations, to erect their railroad bridges over the rivers Passaic and Hackensack, and that they were induced to negotiate because they supposed that the structure and use of their road and bridges would infringe upon the *franchise* of the complainants, it is a *non sequitur* that the language of the act of 1860 put the defendants even in a doubtful position as to their obligation to compensate.

In 1832, the practical working of railroads was very little known in this country; and from the provisions of the 8th section of the charter of the New Jersey company, it is manifest that the legislature contemplated that wagons, carriages, and other known vehicles with adaptation to railway tracks, would be passed over the road by persons who had been accustomed to use the bridges and road of the complainants. The railroad company are therein authorized to demand tolls and rates for the passage of all carriages upon their railroad, and are directed to cause their rates of tolls to be inscribed or painted on some conspicuous place *at each gate* where toll should be required to be paid. And it is provided, that no *farmer* belonging to the state shall be required to pay any toll for

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the transportation of the produce of his farm to market over the railroad in his own carriage, weighing not more than one ton, when the weight of such produce shall not exceed one thousand pounds, but the said *farmer* may be charged toll as for an empty carriage. It is not difficult for us to suppose that a grave doubt may then have been raised as to the probable direct interference in the use of the railroad with the exclusive franchise of the complainants, and that the railroad company might naturally have supposed that their interest would be promoted by securing the bridge company stock. But it is clear that, in buying permission to erect bridges and in obtaining the control of the stock in the company, they did not acquire a right to engraft the bridge *franchise* into the charter of their railroad company, so as to claim, by themselves or through the bridge company, that no other *railroad* should be constructed over the rivers within the limits prescribed in the act of 1790 without their permission.

In the supplement, under which the defendants are operating, there is no recognition of a right in any persons but the defendants to place and run cars upon the road which they are building, and to demand fare for the transportation of passengers and merchandise thereon; and no authority is granted to the defendants to charge toll for the passage of carriages of other parties over their road and viaducts.

Seeing, then, that the defendants insist that they do not require in the construction of their railroad, by a viaduct over the river Hackensack, any parts of the rights, privileges, *franchises*, property, bridges, or viaducts of the complainants, there can be no ground for an injunction, unless it is found in the requirement that they shall agree for or condemn rights and franchises *claimed* to be owned by other parties. The complainants insist that the reservation in their favor, at the close of the first section of the supplement to the defendants' charter, created the exclusive privilege now claimed, if none existed before that

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time, and that it contains a legislative recognition of their right to compensation ; and that, by accepting the act, the defendants have debarred themselves from questioning the right, and that they were bound to apply, under their fifth section, for the appointment of commissioners before they could lawfully proceed to construct their viaduct. It would be a forced interpretation of the language of the act to say that any claimant of an *imaginary* franchise or right can stop the construction of the railroad until commissioners shall decide upon the existence of the right ; and if determined by them to *be an entity*, then until they shall settle how much of it is required by the defendants, and what compensation shall be paid by them for its exercise, although they set up that they do not wish to appropriate it, or any part of it.

A right must have an existence before any person or corporation can own or claim to own it. If the defendants, in the construction of their railroad, had deemed it necessary to appropriate and exercise any admitted right, privilege, or franchise that the complainants own or claim to own, and an agreement for its use could not be made, it was their duty to apply for the appointment of commissioners ; but if they do not propose to interfere with the existing rights or franchises of any person or corporation, there is nothing for them to negotiate for with the complainants preliminary to applying for a commission ; and hence there would be nothing for commissioners or a jury, in the event of an appeal, to act upon.

This view of the supplement of 1860 will not injuriously affect the complainants in the enjoyment of their *acknowledged or existing rights*. It was argued correctly by their counsel, that if they should waive the invocation of legal means to protect their franchise, either by giving their consent in writing to its infringement or by waiving a bill to enjoin, they would not thereby waive their right of compensation. By parity of reasoning, if as the work of construction progresses, or after its completion, it shall

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appear that the defendants have interfered with or appropriated any right, privilege, or franchise of the complainants, an action for compensation in damages can be instituted and maintained, and an injunction can be applied for to restrain them from continuing the unlawful appropriation of the complainants' privileges.

But can it be successfully argued that, in 1860, the legislature intended to confer *new privileges* upon the complainants? If such was their design, it could have been expressed in clear and positive terms.

Public grants in derogation of public rights, abridging the exercise of governmental powers and duties, are construed most strictly against the grantees, and nothing should be taken by implication against the state. It seems clear to me that the complainants must in this case rely for compensation upon their rights as they existed before the law of 1860 was passed.

Inasmuch as the prohibition of any other bridges within specified distances, on each river, was introduced into the act of 1790 to protect the proprietors of the two bridges in the enjoyment of their *franchise* of demanding and receiving tolls; and as the viaduct or bridge which the defendants are constructing is not intended either for a toll bridge or a free bridge; and as the defendants design to make the structure complained of a part of the continuous line of railroad from Hoboken to Newark to be adapted to no modes of transit except by the use of railroad cars and locomotive engines, the legislative authority given to the respondents to construct a railroad with viaducts over the rivers cannot be held to be a violation of the contract existing between the state and the grantees from their commissioners or in *fraud of that grant*.

Suppose that the restriction in the act of 1790 had been, that it should not be lawful for any person or persons whatsoever to erect or cause to be erected any free bridge or any other toll bridge over or across either of the rivers within the distances specified, would the structure which

the defendants contemplate to erect over the river Hackensack come within the interdiction, either by the words or the spirit of the protection? If not, how can it be held to be a violation of the franchise, which is protected by the exclusion of *any other* bridge or bridges, or the law which authorizes it be a fraud upon that grant? Can the language employed in the 15th section receive a broader construction than the prohibition of all free bridges and all toll bridges would? The answer shows that the viaduct complained of will be neither of those structures.

Although the cases examined by the Chancellor, and again cited on the argument before this court, may not be entitled to the weight of express authorities, still they show that the inclination of the courts wherein they arose was clearly in favor of the view, which I have enunciated, of the extent of franchises of like character.

In the case of *The Utica and Schenectady Railroad Company*, reported in 6 *Paige* 554, Chancellor Walworth said, "if the grant had in terms given to the corporation the exclusive right of erecting a toll bridge across the river at Schenectady, this subsequent grant to the railroad company to cross the river with their railroad from Schenectady to Utica, and to transport passengers thereon in the ordinary course of their business in the conveyance of travellers from one place to another, would not have been an infringement of the privileges conferred by such prior grant, as a railroad bridge would not be a toll bridge within the intent and meaning of the first grant.

The Supreme Court of North Carolina, in the case of *McRae v. The Wilmington and Raleigh Railroad Co.*, 2 *Jones* 186, held that a law authorizing the extension of a railroad across the northeast branch of Cape Fear river was not a violation of the franchise granted to an individual of building and maintaining a bridge over the river, and taking tolls thereon, although the grant provides that it should not be lawful for any person whatever to build any

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bridge over the said river. Other cases are to the same effect.

The adjudication in the case of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Co.*, reported in 17 *Connecticut*, was relied on by the complainants as abundantly sustaining a contrary doctrine. The first argument of the case took place before the Supreme Court of Errors of the state of Connecticut, composed of the Chief Justice and four associate judges. In the opinion delivered, the Chief Justice took the broad ground, that a prohibition in the law establishing the Enfield Bridge Company, similar to that contained in our act of 1790, was sufficient to prevent the railroad company from erecting a bridge within the prescribed limits, to be used for the sole and exclusive accommodation of the travel on a railroad.

In examining the question, the learned Chief Justice argued that it is not the name "*bridge*," which is sufficient to designate the structure, but its object and intent should be considered. At the close of the report of the case, it is said, that the other judges *ultimately* concurred in the opinion, though Judge Hinman, at first, thought that the structure of the defendants was not "*a bridge*" within the meaning of the plaintiffs' charter. After this decision was made, and the Supreme Court were advised to grant an injunction, the plaintiffs' damages were duly assessed, by commissioners, at \$350, and the money was tendered to and refused by them.

The case subsequently, in the following year, 1846, came again before the same court, the plaintiffs then insisting that their rights extended beyond the bridge franchise, and that they had a contract with the state which had been impaired by legislation.

After full arguments were made, Judge Church read an opinion, which was fully concurred in by Judges White and Hinman. They held that the property and franchises of the bridge company, and the charter which created

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them, are essentially the same, and were both subject to the exercise of the power of eminent domain equally with the property of the private citizens of the state. They also held, that as all powers, privileges, and immunities necessary to carry into effect the purposes and objects of their charter were given to the railroad company, including in terms an authority to erect a bridge, if necessary, across the Connecticut river for the sole accommodation of the travel on the railroad, that they had a right (subject to making compensation for any franchise they might impair) to construct their railroad over the river within the protected limits, although the 19th section of the charter of the Hartford and Springfield Railroad Company, which was extended to the charter of the defendants, provides "that nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company." The Chief Justice and Judge Storrs dissented as to the construction of the 19th section, and held that it was intended, in connection with the other provisions of the charter, to guard against any interference with the rights of the bridge company within the protected limits.

I have cited from the case thus fully for the purpose of showing that the learned Chief Justice held very rigid notions upon the subject of old grants to corporations, and was led to consider them as more sacred and inviolable than the private property and rights of individuals.

After carefully considering that case, I am not convinced that the reasoning of the Chief Justice, in his written opinion, or the conclusions which he reached, should influence our decision.

The charter of the Boston and Lowell railroad corporation, which was adjudicated on in the case cited from 2 *Gray's Reports*, presented a different question. The act was passed in 1830, and contemplating that the railroad would be used by the public with their own vehicles, the legislature provided for the erection of toll houses, the

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establishment of gates, and the appointment of toll gatherers.

In the 12th section, it is provided, that no other railroad than the one thereby granted should, within thirty years from and after the passing of the act, be authorized to be made, leading from Boston, Charlestown, or Cambridge to Lowell, or from either of those three places, to any place within five miles of the northern termination of the road thereby authorized to be made.

The adjudication of the case established that the stipulation in their charter, that no other railroad within a limited time should be authorized to be built, was a part of the right of the Boston and Lowell railroad corporation, which could not be invaded except by the legislature, in their exercise of the right of eminent domain; and that a combination by three distinct railroad companies subsequently chartered for other purposes, so that they formed a continuous railroad line from Lowell to Boston, was an infringement of the exclusive right, and furnished a proper case for an injunction. This case is no authority upon the question as presented in the case now before this court.

My opinion is clear that the Chancellor took the correct view of the case, and that his decree dismissing the bill of complaint should be affirmed.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges COMBS, CLAWSON, HAINES, OGDEN, SWAIN, VREDENBURGH.

For reversal—Judges CORNELISON, VAN DYKE.

McFarland v. Orange and Newark Horse Railroad Co.

BETWEEN OWEN MCFARLAND, appellant, and THE ORANGE
AND NEWARK HORSE RAILROAD COMPANY, respondents.

Vroom and Attorney General, for appellants, :

Hayes and Zabriskie, for respondents.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges CORNELISON, HAINES, RISLEY,
VAN DYKE, VREDENBURGH, WOOD, CLAWSON, OGDEN, SWAIN,
KENNEDY, WHELPLEY.

For reversal—COMBS,



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ADMINISTRATORS.

See EXECUTORS.

AGREEMENT.

The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, or other relatives.

The rule is well settled, that a mere moral obligation constitutes no legal consideration for a contract.

A widow and her son were living together; the former performed certain services, such as washing and ironing, &c.; the latter contributed somewhat to the support of the family. The mother lent to the son, from time to time, small sums of money. The son, having become embarrassed, executed a mortgage to his mother, the consideration being the services and the loans aforesaid.

Held, that, as against creditors, the loans constituted a valid consideration—contra as to the services. *Updyke v. Titus*, 151

A father having conveyed his entire estate to his children upon their stipulating for the support of their parents. A specific performance decreed. *Chubb v. Peckham*, 207

It is a well settled rule, that where services are rendered gratuitously or without any view to compensation, but in the hope of receiving a legacy or devise from the person to whom the services are rendered, the person rendering the services

can recover no compensation therefor.

A father made a verbal agreement with his youngest son, that if he would remain and work his farm, and support and maintain him during his life, that upon his death the son should have the farm. The son remained and worked the farm, for upwards of fifteen years, to the satisfaction of the father, who then becoming displeased with him, conveyed the farm to his two other sons, in consideration of maintenance for life. *Held*—

1. That as it appeared that the complainant's services were rendered to his father not gratuitously, but upon a distinct understanding between himself and his father that he should be compensated for his services, and that the material part of that agreement was, that upon his father's death, provided he continued to serve and provide for him during his life, he should receive the homestead farm, that the agreement thus proved was valid in law.

2. That part performance took the case out of the operation of the statute of frauds.

The bill in this case permitted to be amended after final hearing, so as to make the contract alleged agree with that proved. *Davison v. Davison*, 246

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ANNUITY.

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See PRACTICE 29, 34.

APPEAL.

If the party appealing from the final decree of this court file his appeal within ten days after such decree with the clerk of this court, it will prevent issuing process on such decree without the order of this court or of the Court of Appeals for that purpose.

If the appeal be not filed within the time above limited the motion to stay execution is addressed to the discretion of the court, and will be granted only upon good cause shown. *Schenck v. Conover*, 31

A defendant having a beneficial interest may exhibit a bill of revivor for the purpose of appealing from decree. *Peer v. Cockerow*, 136

BARON AND FEME.

At common law, the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture.

Though a gift from the husband to

the wife is void at law, it will be protected in equity as against the husband, and if made by virtue of an ante-nuptial agreement, as against his creditors also.

A married woman purchasing land with the knowledge and approval of her husband, the title being taken in the name of the husband, and he executing a mortgage thereon for the cost of a dwelling subsequently erected, will acquire no equitable title to the premises, as against the husband's creditors, on the ground that she mainly contributed to paying off the mortgage from the avails of her labor during coverture. *Skillman v. Skillman*, 404

Where husband and wife are made defendants the complainant is entitled to a joint answer. *Collard v. Smith*, 43

BILL.

See PLEADINGS.

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See MORTGAGE 3.

CHATTEL MORTGAGE.

A chattel mortgage is valid under the laws of this state. *Chapman v. Hunt*, 370

CONSTITUTIONAL LAW.

The clause in the charter of the Proprietors of the Bridges over the rivers Passaic and Hackensack, which declares that it shall not be lawful for any person or persons whatsoever to erect, or cause to be

erected, any other bridge or bridges over or across the said river, constitutes a contract on the part of the state, which cannot constitutionally be annulled or abrogated. It is immaterial whether the instrument by which the public faith is pledged is in its terms a contract, or in form a mere legislative enactment: in either event it is equally a contract within the meaning of the constitution.

The Proprietors of the Bridges over the rivers Passaic and Hackensack have, by contract with the state, the exclusive franchise of maintaining said bridges, and taking tolls thereon; and such contract is within the protection of the constitution, which declares that no law shall be passed impairing the obligation of contracts.

But the construction of a viaduct over said river for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not a bridge within the prohibition of said charter.

Public grants are to be construed strictly. *Bridge Co. v. Hoboken Land Improvement Co.*, 81, 503

See CORPORATION 3.

The act of 20th March, 1880, giving the mother the custody of her children under the age of seven, is not unconstitutional. *Bennet v. Bennet*, 114

CONSIDERATION.

See AGREEMENT 1.

CONVEYANCE.

See DEED.

CORPORATION.

1. The charter of the defendants contained the following clause: "the president and directors of said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and

construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark."

Held, that this enactment relates not to the route, but to the termination of the road, and that thereby the road of the company was not excluded from being located in or through Market street. *McFarland v. The Orange and Newark Horse Car Railroad Company*, 17

2. Shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the said corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the bailor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with a blank irrevocable power of attorney for the transfer thereof from the bailor to the bailee.

M. delivered to the complainants the certificates of certain stock of a corporation, accompanied by a power of attorney irrevocable for the transfer thereof, as collateral security for certain of his notes, and the renewals thereof. The charter of said corporation provided that its capital stock should be deemed personal estate, and "be transferable upon the books of said corporation: and further, "that books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of said corporation." A creditor of M. then levied an attachment upon this stock. *Held*, that the transfer to the complainants was effectual as against such attaching creditor. *The Broadway Bank v. McElrath*, 24

3. Upon principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two states can only be conferred

by the concurrent legislation of both states.

When the power to make and maintain such bridge, and take tolls thereon, has been given by the joint legislation of both states, the principle could hardly be admitted, that either state, by its separate legislation, could declare that no other bridge should be built across such river within certain limits, and thus render the franchise exclusive.

By the agreement entered into between the states of New Jersey and Pennsylvania, the river Delaware, in its whole length and breadth, is to be and remain a common highway equally free and open for the use of both states, and each state is to enjoy and exercise concurrent jurisdiction within and upon the water between the shores of said river. Both states concurred in granting to complainants the right to erect and maintain their bridge, and take tolls thereon. The legislature of New Jersey afterwards passed an act declaring "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges across the said river Delaware at any place or places within three miles of the bridge to be erected."

Held, that even if it was the intention that this act should take effect without the assent of the state of Pennsylvania, that it is void on the ground that it is in contravention of the agreement above mentioned between the two states. As neither state, by the exercise of her sole jurisdiction, has the right, by the terms of the agreement, to grant the franchise, so neither can lawfully contract to refuse to grant it.

Under the circumstances, as exhibited in the case, it was further *held*, that the act of 1801, which conferred the exclusive privilege on the complainants, was not designed by the legislature of New Jersey to go into effect until the same had received the assent of the legislature of Pennsylvania.

Whether a corporation has violated its charter or forfeited its fran-

chise, is a question solely for the determination of a court of law.

But when a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for ordinary travel. *President, &c., v. Trenton City Bridge Co.*, 46

4. The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charters, cannot purchase and hold real estate under trusts of their own creation which shall protect their property from the reach of their creditors.

Where property is given to a corporation in trust for a charitable use the trust is the creature of the donor, and he may impose upon it such character, conditions, and qualifications as he may see fit.

But the case is widely different where a corporation attempts, by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors.

The premises in question, and upon which the defendants had erected a house of worship, were conveyed to them for the consideration of one thousand dollars. The deed was an absolute conveyance in fee upon certain trusts that the property should be held as a Lutheran church for ever, &c., and contained a clause that the grantee should not by deed alienate, dispose of, or otherwise charge or encumber said property, &c. The corporation executed a mortgage to secure a legitimate debt.

Held, that the corporation had the legal title to the land, and the power at law of executing the mortgage, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use. *Magie v. German Evangelical Dutch Church*, 77

5. The clause in the charter of the Proprietors of the Bridges over the rivers Passaic and Hackensack, which declares that it shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges over or across the said river, constitutes a contract on the part of the state, which cannot constitutionally be annulled or abrogated.

It is immaterial whether the instrument by which the public faith is pledged is in terms a contract, or in form a mere legislative enactment: in either event it is equally a contract within the meaning of the constitution.

The Proprietors of the Bridges over the rivers Passaic and Hackensack have, by contract with the state, the exclusive franchise of maintaining said bridges, and taking tolls thereon, and such contract is within the protection of the constitution, which declares that no law shall be passed impairing the obligation of contracts.

But the construction of a viaduct over said river for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not a bridge within the prohibition of said charter.

Public grants are to be construed strictly. *Bridge Co. v. Hoboken Land and Improvement Co.*, 81

6. Corporation aggregate must answer under seal of corporation. *Ransom v. Stonington Savings Bank*, 212

7. The complainants were the undisputed owners of all the franklinite and iron ores upon a certain tract, when they were found separate from the zinc, and they claimed to own all the franklinite and iron ores, whether they existed separate from the zinc or not. The defendants were the undisputed owners of all the zinc and other ores on same premises, except franklinite and iron ores, and they claimed to own the franklinite and iron ores when they did not exist separate and distinct from zinc ores. Upon bill filed an injunction had been allowed restraining the defendants from mining, carrying away, or using any franklinite or iron ore. It appeared that the ores or mine-

erals were found combined in such varied proportions as to render it often difficult to decide which metal preponderated in quantity or value in a given specimen, and to render it difficult, if not impossible, to mine either ore without at the same time taking the other. Upon motion being made to dissolve the injunction, on the ground that the whole equity of the bill was denied by the answer, *held*—

1. That the dispute was not about facts, but was a question of legal construction and the proper interpretation of the grants of the mining rights.

2. That the matters in controversy were not of such a nature that they could be met and denied by the answer, so as to entitle the defendants to a dissolution of the injunction as a matter of course. *Boston Franklinite Co. v. New Jersey Zinc Company*, 215

8. Can a corporation enter into a partnership? *Query. Van Kuren v. Trenton L. Co.*, 302

9. A court of equity will grant an injunction to restrain a public nuisance at the instance of a party who sustains a special injury.

But a mere diminution of the value of the property of the party complaining by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.

The location of a railroad through a public street in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment. *Zabriskie v. Jersey City and Bergen Railroad Company*, 314

10. The usual and appropriate meaning of the word "premises" in conveyances is, "the thing demised or granted by the deed."

It is the inflexible rule of law that a deed, except in cases of latent ambiguity, must be construed according to the legal effect and meaning of its terms unaffected by extrinsic evidence.

A mere agreement to transfer the property and stock of an incorporated company cannot affect its legal existence, nor will the actual

transfer of all the real and personal estate of the corporation, including the stock itself, extinguish its charter.

The Sussex Zinc and Copper Mining and Manufacturing Company conveyed to the New Jersey Zinc Company "all the zinc and other ores, except franklinite and iron ores, found or to be found in or upon certain premises; the title and interest of the former company became afterwards legally vested in the Boston Franklinite Company. It appeared that the two ores, zinc and franklinite, existed in the mine in close mechanical combination, so that the one could not be removed without the other; but that at the date of the conveyance the masses or veins on the premises in question were regarded and known as franklinite. *Held—*

1st. That the exception in the deed was not limited to the franklinite and iron ores, where they existed *separate and apart from the zinc.*

2d. That the grantor retained a freehold estate in the thing excepted, and the grantee acquired a freehold estate in the thing granted, and that the terms "zinc ores" and "franklinite and iron ores" were used as a description of the land granted and reserved.

3d. That in construing the deed reference must be had, in order to ascertain the intention of the parties, to the existing state of knowledge of the subject matter, the received meaning of the terms employed, and the usages prevailing at the date of the conveyance.

4th. That by the term "zinc ores," as used in the deed, was meant those veins in which the ore of zinc was the predominating one, and by franklinite not the pure mineral of that name, which was never found except in small and detached specimens, but those veins in which franklinite predominated, and which were known and designated as franklinite ore.

A deed for a mine with mining privileges is not a mere license to take away ore, or the grant of an easement, but of a part of the freehold.

A court of equity will rarely interpose by injunction to restrain the

working of mines until the right is established at law. *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 322

11. A water company, authorized by legislative enactment to use the soil under the public roads for the purpose of constructing their works, having laid their pipes across the street of a city, will be compelled to lower them so as to conform to a new grade established by municipal authority.

No public right can be taken away by mere inference or legal construction—it can only be by express grant.

Equity will not interfere by injunction to redress public nuisances where the object sought can be attained in the ordinary tribunals. *Water Com'rs of Jersey City v. Mayor of Hudson City*, 420

12. A contract is not void because the corporation with which it is made is misnamed therein.

Where the complainant, being a corporation, sues by a wrong name, the bill may be amended, in this respect, at the hearing.

The stockholders compose the corporation, and a mere failure to elect officers at the time designated will not work a dissolution.

The complainants, a building association, received from the defendant his bond and mortgage, reciting that he was a shareholder in said building association, and had agreed to accept, and had received from said corporation, \$100 at the date of the bond, "upon and for the redemption of number 69, being the sum lent or offered to be received by him therefor." The condition of the bond was as follows: "Now, if the said A. W. M., &c., shall pay to the said H. B. Association, number one, upon said share, the sum of \$7, on the third Monday of each month thereafter, for the period of ten years from the date hereof, or until the surplus assets of said corporation shall be sufficient, over and above all its debts and liabilities, to pay on each unredeemed share, to the holder thereof, the sum of \$8," &c. *Held—*

1st. That the failure of other shareholders to pay their monthly dues

- afforded no defence to a suit for the foreclosure of said mortgage.
- 2d. That the contract was in accordance with the charter of the corporation, and was not usurious.
- 3d. That an agreement made by all the parties in interest that the affairs of the company should be wound up, and that the owners of the unredeemed shares should receive the sums they had advanced with interest, and that the owners of the redeemed shares who had given mortgages for the price of redemption should be discharged upon paying the amount of their mortgages with interest was valid, and should be enforced. *Hoboken Building Association v. Martin*, 427
13. The legislature, in 1790, incorporated the complainants, and gave them the power to build a bridge over the Hackensack river, to take tolls for man and beast passing over it, and by the same law enacted that it should not be lawful for any person whatever to erect any other bridge over said river for an hundred years.
- In 1860, the legislature gave to the defendants power to build a railway from Hoboken to Newark, with the necessary viaduct over the said river Hackensack.
- Under this last act, the defendants commenced to build a viaduct over the said river, described in their answer to the bill of complaint thus: "a structure, so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in the cars of the defendants; that the only roadway between said shores and said structure will be two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder."
- Held*. 1. That the said proposed structure was no bridge within the meaning of the complainants' charter.
2. That no structure across the river Hackensack, which had not a footway for man and beast to walk over on, was a bridge within the meaning of the complainants' charter.
3. That the term bridge, as known to the common law, was a structure over a river having a footpath for man and beast; and cases upon this subject reviewed.
4. By the complainants' charter, they may collect tolls from men walking over their bridge, and for animals walking over their bridge drawing their burthens; by the defendants' charter, they cannot collect tolls for such use of their structure: *held*, that the franchises given the defendants are not the same franchises as those given to the complainants, and therefore do not interfere with them.
5. The first, fifth, and sixth sections of the defendants' charter commented on and construed. *The Proprietors of Bridges v. Hoboken Land Company*, 503
14. In practice, commissioners appointed to appraise damages and value lands taken by incorporated companies, have generally united the value of the land and the damages in the same sum without discrimination. *Trenton Water Power v. Chambers*, 199
- The better practice would be to distinguish the value of the land from the damages. *ib.*
- These appraisements include prospective damages. *ib.*

COSTS.

1. Where a bill has been dismissed or demurrer allowed, and another bill is filed for the same matter, this court will stay proceedings in the second suit till the costs of the former are paid. *Updike v. Bartles*, 231
2. Where parties settle out of court neither is entitled to costs from his adversary. *Bruce v. Gale*, 211
3. Where the necessity for filing the bill was occasioned by the misconduct of the defendants as executors,

in omitting to inventory and in refusing to account for moneys which were due the estate, no costs will be allowed them out of the estate. *Post v. Stevens*, 293

4. In partition suits the costs of the proceeding, as well as the partition itself, will be charged upon the several shares in proportion to their respective values.

Counsel fees do not properly constitute a part of the costs and expenses to be charged against the owners of the several shares.

The court will allow to the commissioners such sum beyond the usual fees fixed by the statute as may be proper.

The report of the commissioners designating the boundaries of the several lots, with the map, constitutes the usual return; but the cost of making a field book will be allowed.

A charge for drawing the return is proper.

The cost of a copy of the return for record in the county clerk's office allowed in this case.

A share may be subdivided on partition, and the costs thereof will be charged on that share. *Coles v. Coles*, 367

5. Where complainant's proceedings are regular, the decree is opened at the instance of the defendant on payment of costs.

But where a sole defendant resides out of the state, and no foreign publication is ordered or notice given to the defendant, costs on opening the decree ordered to abide the event of the suit. *Gram v. Dennison*, 438

6. A defendant who is permitted to answer after decree regularly taken, will be required to pay costs. *Emery v. Downing*, 59

7. Costs not allowed either party when? *Moore v. Tail*, 298

8. In a foreclosure suit the costs incurred by the complainant in resisting a motion on the part of the mortgagor to set aside the execution will be ordered paid out of the surplus money in preference to the claim of a purchaser of the mortgaged premises, who takes title from the mortgagor after the decree, and before the motion to set

aside execution. *McPherson v. Housel*, 299

CREDITOR AND DEBTOR.

See FRAUDS.

1. The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charters, cannot purchase and hold real estate under trusts of their own creation, which shall protect their property from the reach of their creditors. *Magic v. The German Church*, 77
2. A creditor having exhausted his remedy by execution at law, has a right to come into a court of equity to set aside a conveyance alleged to have been fraudulently made by his debtor. *Brown v. Fuller*, 271

DECREES.

- A decree will bear only six per cent. interest, although founded on a mortgage bearing seven per cent. *Wilson v. Marsh*, 289
- Decree will not be opened except on good grounds. *Emery v. Downing*, 59

DEED.

1. The question is well settled at common law, that the cancellation of a deed by consent of parties will not divest the grantee, and re-vest in the grantor an estate which has once vested.
- The title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be cancelled, and a conveyance made by her grantor to her husband.
- The testimony of a married woman, illegally elicited before a grand jury on a charge of bigamy against her husband, is not admissible against her on a question of property.
- Can a grand jurymen, being a witness in a suit respecting property, disclose the secrets of the grand jury room? *Query*.

A *feme covert* was seized of certain lands. She being ill, consented, at the solicitation of her husband, to the cancellation of her deed and to a conveyance from her grantor to her husband. During her lifetime her husband married a second wife. Being imprisoned on charge of bigamy, he and his mistress reconveyed the lands to his wife, she and her husband executing a mortgage for the benefit of the husband to a third party; this mortgage was afterwards assigned to complainant, who was a lawyer, the counsel of the husband, and had knowledge that the property had been held by the husband in trust, and that the mortgage was also held in trust for the husband—it was *held* that the complainant had sufficient knowledge to put him on inquiry; that he was not a *bona fide* holder, and that the mortgage was void in his hands. *Wilson v. Hill*, 143

2. By force of the statute, a decree directing a conveyance to be made vests the estate, so that the rights of the parties, in case of a variance between the terms of the decree and of the conveyance, must depend upon the former rather than upon the latter.

The terms of such decree must be construed precisely as the conveyance itself would be.

A conveyance to the grantees and their heirs for the use of the grantees and their heirs, in trust for the persons beneficially interested, does not vest the legal estate in the latter by virtue of the statute for transferring uses into possession.

And where the deed is thus technically drawn the trustees take the legal estate by virtue of the limitation without the aid of any reasoning derived from the nature of the estate.

In construing limitation of trusts courts of equity adopt the rule of law applicable to legal estates.

An estate was conveyed to the grantees in trust to permit the grantor and his family and the father of the grantor, during their lives respectively, to enjoy the estate, and take the rents and profits thereof,

and after their death in trust to convey the premises to the son of the grantor and "to such other lawful issue as the grantor may then have living, share and share alike in fee simple, as soon as he or they arrive at age,"—*held*, that the son of grantor had a vested interest, which was not determinable by his death before the happening of the contingency upon which the legal estate was to be conveyed to him, *viz.* the determination of the intervening life estates. The general rule, as applied to legal estates, is no remainder will be construed to be contingent which may consistently with the intention be deemed vested.

It is the uncertainty of the right of enjoyment which renders the remainder contingent, not the uncertainty of the actual enjoyment.

In a deed, the word "issue" is universally a word of purchase, and whenever the word is made use of as a word of purchase, either in a deed or in a will, it is synonymous and coextensive with the term "descendants." *Price v. Sisson*, 168

3. Where a mistake has occurred in the sale of lands, equity has power to reform the conveyance. *Durant v. Bacot*, 201

4. But where a deed is drawn strictly in accordance with the intention of the parties, although from a mistake in judgment it will not effect the end in view, there is no case presented for the interference of the court. *ib.*

5. The usual and appropriate meaning of the word "premises" in conveyances is, "the thing demised or granted by the deed."

It is the inflexible rule of law that a deed, except in cases of latent ambiguity, must be construed according to the legal effect and meaning of its terms unaffected by extrinsic evidence.

A mere agreement to transfer the property and stock of an incorporated company cannot affect its legal existence, nor will the actual transfer of all the real and personal estate of the corporation, including the stock itself, extinguish its charter.

The Sussex Zinc and Copper Mining

- and Manufacturing Company conveyed to the New Jersey Zinc Company "all the zinc and other ores, except franklinite and iron ores, found or to be found in or upon certain premises; the title and interest of the former company became afterwards legally vested in the Boston Franklinite Company. It appeared that the two ores, zinc and franklinite, existed in the mine in close mechanical combination, so that the one could not be removed without the other; but that at the date of the conveyance the masses or veins on the premises in question were regarded and known as franklinite. *Held*—
- 1st. That the exception in the deed was not limited to the franklinite and iron ores, where they existed *separate and apart from the zinc*.
 - 2d. That the grantor retained a freehold estate in the thing excepted and the grantee acquired a freehold estate in the thing granted, and that the terms "zinc ores" and "franklinite and iron ores" were used as a description of the land granted and reserved.
 - 3d. That in construing the deed reference must be had, in order to ascertain the intention of the parties, to the existing state of knowledge of the subject matter, the received meaning of the terms employed, and the usages prevailing at the date of the conveyance.
 - 4th. That by the term "zinc ores," as used in the deed, was meant those veins in which the ore of zinc was the predominating one, and by franklinite not the pure mineral of that name, which was never found except in small and detached specimens, but those veins in which franklinite predominated, and which were known and designated as franklinite ore.
- A deed for a mine with mining privileges is not a mere license to take away ore, or the grant of an easement, but of a part of the freehold.
- A court of equity will rarely interpose by injunction to restrain the working of mines until the right is established at law. *New Jersey Zinc Co. v. New Jersey Franklinite Company*, 322
6. A deed made to hinder, delay, or

defraud creditors is void only as to creditors; it is valid as against the grantor and his heirs.

The terms of the contract must be clearly proved before a party is entitled to a decree for its specific performance. *Lokerson v. Stillwell*, 357

7. A deed to be valid must go into the hands of the grantees with the consent of the grantors.

In the absence of all evidence to the contrary, mere possession by the grantee of a complete instrument is sufficient evidence of a lawful delivery.

Mere tradition of a sealed instrument, even to the party in whose favor it is drawn, does not necessarily in all cases make it a deed.

A sealed instrument, intrusted to a party with authority to deliver it to the grantee in case certain conditions are complied with, will not become a deed if delivered without compliance with such conditions.

If the instrument be once delivered to the party who on its face is entitled to it, it becomes *eo instanti* a deed, and no agreement in conflict with its plain terms will be permitted to be proved to show that its operation as a deed is to depend on the performance of some condition subsequent.

Where the proof is clear that final transfer of the instrument was not to be made unless certain terms were complied with, the law puts the party claiming its benefit to the proof of compliance.

Parol evidence to defeat an instrument as a deed is admissible to show that when the defendants, or some of them, signed the instrument, it was stated by them, to the agent procuring their signatures, that it should be binding on them only in the event of its execution by certain other persons.

Neither does it make any difference whether the agent ever communicated the limitation to the party accepting the deed.

The principle is settled, that one who claims through a special agent takes the risk of his want of power.

The minutes of a corporation are not evidence of an agreement alleged to have been made by the stock-

holders as individuals, and not intended to bind the corporation. The object of an issue out of chancery to be tried by a jury is to inform the conscience of the Chancellor, and it is his province to determine what evidence shall be read before the jury.

The action of the Chancellor on the verdict is a matter resting in his discretion, and is not subject to review in the appellate court.

Where twenty-one out of thirty-seven stockholders of a railroad company sign and deliver a bond for the payment of \$35,000 to three of their own number, and it appears upon the face of the instrument that the bond was to be binding upon such as should sign it, and that each should become responsible when and as he signed it, parol proof is not admissible to show that it was not to be binding on any, until all the stockholders had signed it.—Per VREDENBURGH, dissenting.

A bond in the following words—“We, John Black, Thomas Haines, (&c., naming nineteen others,) stockholders in the Delaware and Atlantic Railroad, send greeting: Whereas the Delaware and Atlantic Railroad Company borrowed of John Black and (two others) \$35,000; and whereas we, whose names are hereunto subscribed and seals affixed, have agreed with the said Black and others that in case the corporate property should fail to pay said \$35,000 and interest, so that a loss or deficiency should happen, that in that event each of us and each of them, the said Black and others, shall sustain an equal portion of said loss,” expresses upon its face that each should become responsible when and as he signed it, and excludes parol proof that none were to be responsible until all the stockholders of the company had signed it.—Per VREDENBURGH, dissenting. *Black v. Shreve*, 435

8. A deed of conveyance, absolute in its terms, given to secure a loan of money is a mortgage, and the right of redemption exists although the money was not repaid at the time agreed upon.

Once a mortgage always a mortgage, is a maxim of equity, to which there is no exception.

The right of redemption is an inseparable incident of which the mortgagor cannot deprive himself, even by an express covenant. *Van-derhaize v. Hugues*, 244

DESERTION.

See DIVORCE.

DIVORCE.

1. To establish a case of desertion sufficient to authorize a divorce, it should appear that the wife left her husband of her own accord, without his consent and against his will, or that she obstinately refused to return without just cause on the request of her husband.

Desertion cannot be inferred from the mere unaided fact that the parties do not live together. *Jennings v. Jennings*, 38

2. A divorce will not be decreed upon proof that the husband went away and lived apart from the wife. A mere separation cannot be considered a desertion within the meaning of the statute. *Cook v. Cook*, 263

3. Divorce on ground of abandonment. *Yates v. Yates*, 280

4. A divorce cannot be had on the ground of adultery if the husband has been reconciled to his wife after the adultery committed by her, or knowingly retain her after she has committed adultery. *Marsh v. Marsh*, 281

5. A wife having left her home with the consent of her husband with the intent of spending the holidays with her mother, her subsequent change of purpose and refusal to return will not convert such absence into a wilful desertion from the time of leaving her home within the act relating to divorces. *Conger v. Conger*, 286

DOMICIL.

PRACTICE 9.

DOWER.

1. In proceedings for dower, if the defendant deny the complainant's right to dower the question must be tried at law.

But the court may inquire of what estate the husband died seized, and this involves an inquiry into the nature and character of the husband's right to the estate.

A bill setting up an equitable title to the land in the widow, and praying that if that claim shall fail that dower may be assigned, is not multifarious.

An objection to a bill on the ground of multifariousness, taken at the hearing, is not much favored.

Where the guardian of a female infant wrongfully converted the personal estate in his hands into lands, placing the title in a third person, who afterwards conveyed the same to the husband of the infant, upon the death of the husband the widow cannot claim an equitable title to such lands. *Rockwell v. Morgan*, 384

2. An order for maintenance *pendente lite* will not be made in behalf of a widow on her bill for dower.

Upon general principles alimony or maintenance is not allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband. *Ib.* 119

3. The wife's right of dower will be protected as against post nuptial mortgages not executed by her. *Hayes v. Whitall*, 241

4. Agreement of widow in partition to accept sum in gross for her dower. *Mulford v. Hiers*, 1

If she die after sale and after agreeing to accept sum in gross, such sum shall go to her children. *ib.*

EASEMENT.

Where the owner of a spring lot, and of a paper mill on another tract, by an artificial arrangement conveys the water to the mill, and then sells the spring lot, the purchaser takes it subject to the burthen.

The principle is, that where the owner of two tenements sells one

of them, the purchaser takes the tenement, or portion sold, with all the benefits and burthens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. *Seymour v. Lewis*, 439

EVIDENCE.

1. The law requires wills, both of real and personal estate, to be in writing, and parol evidence is not admissible to add to, contradict, or vary their contents. *Cleveland v. Havens*, 101

2. The testimony of a married woman illegally elicited before a grand jury, on a charge of bigamy against her husband, is not admissible against her on a question of property. *Wilson v. Hill*, 143

3. Can a grand jurymen, being a witness in a suit respecting property, disclose the secrets of the grand jury room? *Query.* *ib.*

4. An injunction of lunacy is not conclusive evidence on the question of incapacity. *Hunt v. Hunt*, 161

5. Where a decree, by force of the statute, directs a conveyance to be made, and the conveyance so made varies from the decree, the estate vests according to the decree. *Price v. Sisson*, 168

6. It is not competent for the purchaser to show by parol evidence that the scrivener who drew the codicil made a mistake, and that he was to have two-thirds of the lot behind barn. *Jones' Executors v. Jones*, 236

7. The lapse of twenty years without payment of principal or interest of a legacy will raise a presumption of payment. *Hayes v. Whitall*, 241

8. Parol evidence of the declarations of the testator is not admissible to show an intention to charge legacies upon the land. *Massaker v. Massaker*, 264

9. Evidence relative to matters not stated in the pleading, nor fairly within its general allegations, is impertinent, and cannot be made the foundation of a decree. *Tansciver v. Bryan*, 434

10. Where proof is clear that final

- made transfer of a deed was not to be unless certain terms were complied with, the law puts the party claiming its benefit to the proof of compliance. *Black v. Shreve*, 455
11. Parol evidence to defeat an instrument as a deed is admissible to show that when defendants, or some of them, signed the instrument, it was stated by them to the agent procuring their signatures, that it should be binding on them only in the event of its execution by certain other persons. *ib.*
 12. The minutes of a corporation are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. *ib.*
 13. If no replication has been filed, the facts stated in the answer must be taken as true on the hearing. *Gaskill v. Sine*, 130
 14. A codicil cannot be altered by parol evidence of a mistake of the scrivener. *Jones' Executors v. Jones*, 237
 15. The lapse of twenty years without payment of principal or interest of a legacy will raise a presumption of payment, but such presumption may be overcome by evidence. *Hayes v. Whitall*, 241
- Parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted by fraud, surprise, or mistake. *Lokerson v. Stillwell*, 357
- that when executors jointly settle their final account they are jointly liable for the balance so ascertained.
- In such case the parties interested may rely on the settlement, and are not driven to a discovery in whose hands the funds are or in what proportion the executors are liable.
- If a trustee, by his own negligence, suffers his cotrustee to receive and waste the trust fund, when he had the means of preventing such receipt and waste by the exercise of reasonable care and diligence, he will in such case be held personally responsible for the loss. *Laroc v. Douglass*, 308
4. Where the necessity for filing the bill was occasioned by the misconduct of the defendants as executors, in omitting to inventory and in refusing to account for moneys which were due the estate, no costs will be allowed them out of the estate. *Post v. Stevens*, 293
 5. The rule is inflexible, that a sale made by an administrator, or any other acting in a fiduciary capacity, to himself or for his benefit, will be held void at the instance of the party prejudiced.
- The remedy in equity is to set aside the sale on equitable terms, and to treat the administrator as a trustee for the parties in interest. *Houston v. Cassidy*, 228
- See *Smith v. Smith*, 164

EXECUTOR AND ADMINISTRATOR.

1. Amount of commissions to be allowed. *Holcombe v. Holcombe*, 415
2. In case the will directs the executors to invest the residue of the personal estate, and the interest to accrue thereon "in good productive real estate at their discretion," and one of the executors, having funds in his hands, is prevented by the misconduct of his coexecutors from making the investment directed by the will, it is his duty to guard the estate from loss by applying, within a reasonable time, to the proper court for instructions. *ib.* 413
3. The law is well settled in this state,

FEIGNED ISSUE.

See PRACTICE 37.

FEME COVERT.

1. Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable.
- The act of 1857, which provides that a *feme covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real

estate, or to make contracts in regard to it.

A contract entered into by a married woman for the sale of her estate cannot be enforced.

But equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate. *Pentz v. Simonson*, 232

2. To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment.

Where the title to land is in a married woman as her separate property, she and her husband living separate, and money is paid and advanced at her instance and for her benefit, a mortgage executed by her alone to secure such advances will be a valid and equitable lien on such property. *Wilson v. Brown*, 277

3. At common law, the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture.

Though a gift from the husband to the wife is void at law, it will be protected in equity as against the husband, and if made by virtue of an ante-nuptial agreement, as against his creditors also.

A married woman purchasing land with the knowledge and approval of her husband, the title being taken in the name of the husband, and he executing a mortgage thereon for the cost of a dwelling subsequently erected, will acquire no equitable title to the premises, as against the husband's creditors, on the ground that she mainly contributed to paying off the mortgage from the avails of her labor during coverture. *Skillman v. Skillman*, 403

4. The mother is entitled to the custody of her children who are under the age of seven. *Bennet v. Bennet*, 114

5. Separate property of feme—when chargeable. *Wilson v. Brown*, 277

FRAUD.

A creditor, having exhausted his remedy by execution at law, has a right to come into a court of equity to set aside a conveyance alleged to have been fraudulently made by his debtor. *Brown v. Fuller*, 271
Deed obtained by undue influence. *Hunt v. Hunt*, 161

GUARDIANSHIP.

See FEME COVERT 4.

HUSBAND AND WIFE.

See BARON AND FEME.
FEME COVERT.

INFANT.

See FEME COVERT 4.

INJUNCTION.

1. An injunction staying proceedings in ejectment was granted on a bill setting up loss of title deeds. The answer denied fully all knowledge of deeds alleged to have been lost. *Held*, that injunction should be dissolved.

A mere formal or technical denial of the charges of the bill is not, as of course, sufficient to dissolve an injunction.

The staleness of the *defendant's* claim, which he was enforcing at law, affords no ground for continuing an injunction against him. It is the claim of the *complainant* to which the equitable defence of a stale claim is applicable. *Horner v. Jobs*, 19

2. When a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for

- ordinary travel. *Trenton Bridge v. City Bridge*, 46
3. In cases of public nuisance, a bill in equity asking relief by way of prevention can be maintained by a private person only on the ground of apprehended special damage peculiar to himself, and distinct from that done to the public at large.
- A statute of this state authorized the freeholders of the county of Monmouth to erect a bridge over the Navesink river, "beginning at or near the house of Samuel Hubbard, esq., commonly called Smock's point, or near the house of Joseph Van Schoick, or from Joseph Smith's point to the opposite shore." On 3d January, 1826, the freeholders selected the site for the bridge, and upon which it was accordingly erected. A railroad had been recently constructed intersecting the road near the bridge at the south side of the river, rendering the use of the road at that terminus dangerous. To avoid this inconvenience, it was now proposed, in erecting a new bridge, to locate its southern terminus at a point about one hundred yards west of its original site. The complainant was the owner of about twenty-five acres of land, near the termination of the existing bridge, bounding on the public road leading from the bridge, of a valuable wharf upon the river, a boarding house, and other valuable improvements, situate upon streets connected with the road leading to the bridge, to all of which it afforded the most convenient access.
- Held*—1st. That the right to erect bridges over navigable rivers does not reside in the chosen freeholders by virtue of their general powers, but must be derived from special power conferred by the legislature.
- 2d. That by the above act, the power of locating the bridge within certain limits was given to the discretion of the freeholders; but that having exercised that discretion, and the selection having been made, their power was exhausted.
- 3d. That in this case the freeholders had not the power materially to alter either terminus of the bridge.
- 4th. That the injury sustained by the complainant was in no sense peculiar to himself, and on this account his bill could not be sustained.
- 5th. That although the new bridge was technically a nuisance, yet as it was being built in good faith and for the public benefit, a court of equity would not restrain its erection, even on an information by the attorney general in behalf of the public. *Allen v. Board of Chosen Freeholders*, 67
4. The complainants were the undisputed owners of all the franklinite and iron ores upon a certain tract, when they were found separate from the zinc, and they claimed to own all the franklinite and iron ores, whether they existed separate from the zinc or not. The defendants were the undisputed owners of all the zinc and other ores on same premises, except franklinite and iron ores, and they claimed to own the franklinite and iron ores when they did not exist separate and distinct from zinc ores. Upon bill filed an injunction had been allowed restraining the defendants from mining, carrying away, or using any franklinite or iron ore. It appeared that the ores or minerals were found combined in such varied proportions as to render it often difficult to decide which metal preponderated in quantity or value in a given specimen, and to render it difficult, if not impossible, to mine either ore without at the same time taking the other. Upon motion being made to dissolve the injunction, on the ground that the whole equity of the bill was denied by the answer, *held*—
1. That the dispute was not about facts, but was a question of legal construction and the proper interpretation of the grants of the mining rights.
2. That the matters in controversy were not of such a nature that they could be met and denied by the answer, so as to entitle the defendants to a dissolution of the injunction as a matter of course. *Boston Franklinite Co. v. New Jersey Zinc Company*, 215
5. A nice or doubtful question of law will not be decided on a motion

- to dissolve an injunction, but will be reserved for the final hearing.
- An injunction restraining interference with the complainant in the exercise of his rights as a partner of the defendants will be dissolved on the clear averment in the answer, that the partnership was dissolved by mutual consent.
- Can a corporation enter into a copartnership? *Query. Van Kuren v. Trenton L. Co.*, 302
6. A court of equity will grant an injunction to restrain a public nuisance at the instance of a party who sustains a special injury.
- But a mere diminution of the value of the property of the party complaining by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.
- The location of a railroad through a public street in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment. *Zabriskie v. Jersey City Railroad Company*, 314
7. In case of a bill for specific performance of an agreement for the sale of land, containing averments of a parol enlargement of the time of payment, possession, and the erection of permanent improvements, the injunction will be dissolved upon the filing of an answer denying those averments.
- It is not necessary that affidavits annexed to answers should be taken upon notice, or that copies should be served on the adverse party.
- Where a motion is made to dissolve an injunction upon the answer, affidavits annexed to the answer can only be read in reply to affidavits annexed to the bill. *Garriss v. Garriss*, 320
8. A court of equity will rarely interpose by injunction to restrain the working of mines until the right is established at law. *New Jersey Zinc Co. v. New Jersey Franklinile Company*, 322
9. Where the ends of justice require it, the injunction will be continued to the hearing. *Stotesbury v. Vail*, 390
10. To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him.
- Personal service will be dispensed with where the party is out of the state or cannot be found.
- The modern practice is for the court, by special order, to dispense with personal service where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper.
- The court will punish the violation of its order for the injunction though the writ be not served, if it appear that the defendant knew of its existence.
- Where the defendant and his wife were nonresidents, and the injunction was served out of the state on the husband, and proof was made that the wife could not be found, an order was made that such service should be deemed valid, and directing a copy of such order to be served at the dwelling house of the defendants. *Haring v. Kauffman*, 397
11. Equity will not interfere by injunction to redress public nuisances where the object sought can be attained in the ordinary tribunals. *Jersey City v. Hudson City*, 420

INTEREST.

Decrees bear six per cent. interest in all cases. *Wilson v. Marsh*, 289

JUDGMENT.

A judgment without the issuing of an execution operates as a lien from the time of its entry on the lands of the defendant, and a subsequent conveyance or mortgage executed by the defendant will not defeat such lien. *Vanaciver v. Bryan*, 431

JURISDICTION.

Where it appears that by the judgment of a court in another state, between the same parties, all the material matters of equity relied upon by the complainant in his

suit in this court are adjudicated and settled, the bill of complaint will be dismissed.

A court of equity will not permit a party, who has had his rights fully investigated and decided in a court of equity in another state, to avoid a final decision in that tribunal, and to raise for reinvestigation the same questions on the same facts. *Brown v. Lexington and D. Railroad Co.*, 191

LEGACY.

1. When legacies are directed to be paid out of the *estate* of the testator, the real estate is charged with the legacies.

So when the lands are devised to the executors, who are directed to pay the legacies.

The general rule, that a legacy bears interest from the time it is payable, admits of an exception where a legacy given by a parent to a minor child is made payable at a future day, and no provision is made for the support of the legatee in the meantime.

Interest not allowed under the language of the will in question and the circumstances of the case. *Cor etur v. Corkendall*, 138

2. A testator devised as follows, viz. "Item. I give and bequeath to my beloved wife the use and benefit of my home farm on which I now live as long as she remains my widow. At her marriage or decease, I will that the aforesaid farm be sold at one or two years' credit. Item. I give and bequeath also to my beloved wife Mary five hundred dollars of the money arising out of the sale of said farm." By a subsequent clause, the testator gave as follows: "Item. I give and bequeath to my beloved wife Mary one hundred dollars out of the personal estate."

Held, that the bequest of five hundred dollars to the wife was vested at death of testator, and at her death passed to her personal representatives. *Owen v. Owen*, 188

3. When an annuity is charged on real estate the rule is, that it does not commence until the devisee of such

estate is entitled to the possession thereof.

This principle is applicable where a sum of money is charged on land in which the testator had only a reversion.

The lapse of twenty years without payment or allowance of principal or interest of a legacy will raise a presumption of payment, but such presumption may be overcome by evidence.

The wife's right of dower will be protected as against post nuptial mortgages not executed by her. *Huges and Wife v. Whitall*, 241

See WILLS.

LIMITATION.

The staleness of the *defendant's* claim, which he was enforcing at law, affords no ground for continuing an injunction against him. It is the claim of the *complainant* to which the equitable defence of a stale claim is applicable. *Horner v. Jobs*, 19

The lapse of twenty years without payment of principal or interest of a legacy will raise a presumption of payment. *Hayes v. Whitall*, 241

LIS PENDENS.

A person purchasing *pendente lite* is subject to all the equities of the person under whom he claims. *McPherson v. Housel*, 299

LUNACY.

1. An inquisition of lunacy is not conclusive evidence on the question of incapacity.

The evidence in this case *held* to establish the fact, that the grantee was incapable, from mental incapacity, to make the deed in question.

Held, also, that the conveyance would have been set aside on the further ground of undue influence exercised by the grantee and his family over the grantor, a map of

weak mind, the consideration of the deed also being inadequate. *Hunt v. Hunt*, 161

MARRIED WOMEN.

See FEME COVERT.
BARON AND FEME.

MECHANICS' LIEN.

A mechanic's lien under the statute takes priority upon the building over a prior mortgage upon the land.

But the supplement of 16th March, 1859, which creates a lien for repairs, makes it subject to any mortgage prior to the filing of the lien. In this case the premises ordered to be sold entire, and relative value of building and land ascertained. *Newark Lime and Cement Co. v. Morrison*, 133

MINES.

See DEED 5.

MISTAKE.

1. Where a mistake has occurred in the sale of lands, there is no doubt of the power of a court of equity to reform the conveyance.

But when a deed is drawn strictly in accordance with the intention of the parties, although from a mistake in judgment it will not effect the end in view, there is no case presented for the interference of the court. *Durant v. Bacot*, 201

MORTGAGE.

1. In a case of several mortgages to a large amount which were undisputed, and of subsequent judgments, some of which were in controversy, the court will not, on the application of the mortgagor, stay proceedings on the execution under the decree of foreclosure; but will order the surplus money to be brought into court to abide the re-

sult of the contest touching the judgments. *Schenck v. Conover*, 31

2. Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage debt.

This obligation of the purchaser to pay the debt enures in equity to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency in a bill to foreclose. *Klayworth v. Dressler*, 62

3. The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charters, cannot purchase and hold real estate under trusts of their own creation which shall protect their property from the reach of their creditors.

Where property is given to a corporation in trust for a charitable use the trust is the creature of the donor, and he may impose upon it such character, conditions, and qualifications as he may see fit.

But the case is widely different where a corporation attempts, by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors.

The premises in question, and upon which the defendants had erected a house of worship, were conveyed to them for the consideration of one thousand dollars. The deed was an absolute conveyance in fee upon certain trusts that the property should be held as a Lutheran church for ever, &c., and contained a clause that the grantees should not by deed alienate, dispose of, or otherwise charge or encumber said property, &c. The corporation executed a mortgage to secure a legitimate debt.

Held, that the corporation had the legal title to the land, and the power at law of executing the mortgage, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use. *Magie v. German Evangelical Dutch Church*, 77

4. After the testimony has been closed, and the cause regularly set down for final hearing, the court will not permit a supplementary answer to be put in, unless the delay is satisfactorily accounted for.
It should appear that the matter of the supplementary answer is new, or a sufficient reason given for not having it in the original answer.
The mortgage sought to be foreclosed was given to secure part of the consideration on the purchase of the mortgaged premises. The title to a part of the premises failed. The complainants were not the vendors of the premises nor the original mortgagees. They held the mortgage by assignment, executed prior to the sale of the premises by the original mortgagor to the defendant. Under these circumstances, the fact that the title made by the mortgagor to the defendant, the present owner, was defective, can in no wise affect the rights of a *bona fide* mortgagee under a mortgage executed prior to the conveyance. *Smallwood v. Lewin*, 123
5. A mechanic's lien under the statute takes priority upon the *building* over a prior mortgage upon the *land*.
But the supplement of 16th March, 1859, which creates a lien for *repairs*, makes it subject to any mortgage prior to the filing of the lien.
In this case the premises ordered to be sold entire, and relative value of building and land ascertained. *Newark Lime and Cement Co. v. Morrison*, 133
6. After sale on foreclosure the court will compel the mortgagor, or any person who has come in possession under him pending the suit, or whose title is not superior to his, to deliver up the possession of the premises, and will not drive the purchaser to an action of ejectment.
And this assistance will be extended to a stranger to the record purchasing at such sale as well as to the mortgagee.
The mode of proceeding has been as follows, viz. 1, a demand of possession by the purchaser of the tenant in possession accompanied by an exhibit of the deed from the sheriff or master; 2, order to deliver possession; 3, injunction; and 4, writ of assistance.
The exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. *Schenck v. Conover*, 220
7. A deed of conveyance, absolute in its terms, given to secure a loan of money is a mortgage, and the right of redemption exists although the money was not repaid at the time agreed upon.
Once a mortgage always a mortgage, is a maxim of equity, to which there is no exception.
The right of redemption is an inseparable incident of which the mortgagor cannot deprive himself, even by an express covenant. *Van derhaize v. Hugues*, 244
8. A mortgagee is a purchaser of the mortgaged premises within the intent of the statute of frauds.
A. and B. jointly executed a mortgage to secure \$5000 upon land of which they were equally seized as tenants in common. A., by an arrangement with B., received only \$1000 of the mortgage money. B. afterwards executed a second mortgage to another party on his moiety of said lands and on another lot owned by him in severalty. Both mortgages have been duly recorded. *Held*, that as against such second mortgagee, the first mortgage was a lien equally on the shares of A. and B. in the premises. *Lavalette v. Thompson*, 274
9. A mortgagor conveying the premises procured and delivered to the vendee a receipt from the mortgagee showing that the interest on the mortgage was paid to time of sale. The vendee afterwards sold the premises, stating that the interest was paid as above, but subsequently redelivered the receipt to his vendor, who gave it up to the mortgagee. *Held*, that the interest could not be recovered against the second vendee on a foreclosure of the mortgage. *Moore v. Vail*, 296
10. A person purchasing *pendente lite*

is subject to all the equities of the person under whom he claims.

In a foreclosure suit the costs incurred by the complainant in resisting a motion on the part of the mortgagor to set aside the execution will be ordered paid out of the surplus money in preference to the claim of a purchaser of the mortgaged premises, who takes title from the mortgagor after the decree, and before the motion to set aside execution. *McPherson v. Housel*, 299

11. To constitute a mortgage, the conveyance must be *originally intended* between the parties as a security for money or as an encumbrance merely.

Parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted by fraud, surprise, or mistake. *Lokerson v. Stillwell*, 357

12. A chattel mortgage is a valid contract under the laws of this state, and the rights of the parties under it will be protected and enforced at law and in equity.

The interest of the mortgagee in personal property, where the possession remains with the mortgagor and before condition broken, cannot be taken in execution as the property of the mortgagee.

After forfeiture the mortgagee, even without foreclosure, may, upon due notice, sell and transfer the absolute right to the chattels.

Actual possession of the chattel is not essential to support his title.

Equity will not permit the mortgagor to sell the chattels to which the mortgagee has the legal title and the right of immediate possession, and to place them beyond the reach of the mortgagee and the control of the court. *Chapman v. Hunt*, 370

13. Where two lots are mortgaged to secure the same debt, and one of them is subsequently sold and conveyed by the mortgagor, the other lot is primarily liable under the mortgage.

A release subsequently given by the mortgagee to the mortgagor upon the remaining unsold lot, without the assent of the purchaser of the

lot sold, will not prejudice the rights of the purchaser.

If the lot released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the lot first sold; but if sufficient to satisfy only a part of the debt, such first sold lot, in the hands of the purchaser, will be answerable for the deficiency.

Reference ordered to ascertain the amount due on the mortgage and the value of the premises released. *Gaskill v. Sine*, 400

14. Where a deed of conveyance, absolute in its form, was made, and the grantee executed a covenant, bearing even date, to reconvey upon the payment of a certain sum within a specified period, and it appeared that the deed was intended as a mortgage to secure certain loans, *held*—

1. That the grantor was entitled to redeem.
2. That the grantee of the premises should account for the rents.
3. That credit should be given to the grantee for necessary repairs, costs of insurance, and lasting improvements, but no allowance for renting or taking care of premises. *Vanderhaize v. Hugues*, 410

MULTIFARIOUSNESS.

See PLEADING 3.

NEWARK.

1. The charter of the defendants contained the following clause: "the president and directors of said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark."

Held, that this enactment relates not to the route, but to the termination of the road, and that thereby the road of the company was not ex-

cluded from being located in or through Market street. *McFarland v. The Orange and Newark Horse Car Railroad Company*, 17

NUISANCE.

1. See INJUNCTION 3.

2. A court of equity will grant an injunction to restrain a public nuisance at the instance of a party who sustains a special injury. *Zabriskie v. Jersey City and B. R. R.*, 314
3. But a mere diminution of the value of the property of the party complaining by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *ib.*
4. The location of a railroad through a public street in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment. *ib.*

PARTIES.

1. On bills to restrain the execution of process or the performance of official acts the sheriff is made a party, as the design of the injunction is to restrain him from acting; but where no relief is prayed, and no decree asked against the officer, it is not necessary, nor usually expedient, for the sheriff to answer. *Brooks v. Lewis*, 214
2. On a bill filed for an account and to execute the trust created by a deed absolute on its face, but which in point of fact was executed upon certain trusts, viz. to satisfy the debts of the grantor, and then for the use and benefit of his family, the widow and heirs of the grantor are not only proper but necessary parties.
- All persons whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties. *Pence v. Pence*, 257

PARENT AND CHILD.

1. At common law the father, in the first instance, is entitled to the custody of his children, but courts will exercise a sound discretion for the benefit of the children in disposing of their custody.

The act of the 20th of March, 1860, has materially altered the rule of the common law, and has, to a certain extent, deprived the court of this exercise of its discretion in disposing of the custody of children. By this act the custody of the children within the age of seven years is transferred from the father to the mother.

This act is not unconstitutional, nor is it void as being incompatible with the fundamental principles of government. *Bennett v. Bennett*, 114

2. The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, or other relatives.

The rule is well settled, that a mere moral obligation constitutes no legal consideration for a contract.

A widow and her son were living together; the former performed certain services, such as washing and ironing, &c.; the latter contributed somewhat to the support of the family. The mother lent to the son, from time to time, small sums of money. The son, having become embarrassed, executed a mortgage to his mother, the consideration being the services and the loans aforesaid.

Held, that, as against creditors, the loans constituted a valid consideration—contra as to the services. *Updyke v. Titus*, 151

3. Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.

A father, having conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suitable to their condition, wherever they or either of them might choose to reside, a specific performance of the contract

- was decreed in his favor. *Chubb v. Peckham*, 207
4. It is a well settled rule, that where services are rendered gratuitously or without any view to compensation, but in the hope of receiving a legacy or devise from the person to whom the services are rendered, the person rendering the services can recover no compensation therefor.
- A father made a verbal agreement with his youngest son, that if he would remain and work his farm, and support and maintain him during his life, that upon his death the son should have the farm. The son remained and worked the farm, for upwards of fifteen years, to the satisfaction of the father, who then becoming displeased with him, conveyed the farm to his two other sons, in consideration of maintenance for life. *Held*—
1. That as it appeared that the complainant's services were rendered to his father not gratuitously, but upon a distinct understanding between himself and his father that he should be compensated for his services, and that the material part of that agreement was, that upon his father's death, provided he continued to serve and provide for him during his life, he should receive the homestead farm, that the agreement thus proved was valid in law.
 2. That part performance took the case out of the operation of the statute of frauds.
- The bill in this case permitted to be amended after final hearing, so as to make the contract alleged agree with that proved. *Davison v. Davison*, 246

PARTITION.

1. In proceedings for partition, where after a sale of the premises the widow, who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statutes of this state, to accept in lieu of her said dower such sum in gross as the Chancellor should deem reasonable, and then having died before distribu-

tion, it was held, that the right vested in the widow to receive a sum in gross could not be divested by her death, but should go to her children. *Held further*, that the value of the widow's interest should be ascertained on the principles of life annuities.

Where the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale. *Mulford and Wife v. Hiers*, 13

2. In partition suits the costs of the proceeding, as well as the partition itself, will be charged upon the several shares in proportion to their respective values.

Counsel fees do not properly constitute a part of the costs and expenses to be charged against the owners of the several shares.

The court will allow to the commissioners such sum beyond the usual fees fixed by the statute as may be proper.

The report of the commissioners designating the boundaries of the several lots, with the map, constitutes the usual return; but the cost of making a field book will be allowed.

A charge for drawing the return is proper.

The cost of a copy of the return for record in the county clerk's office allowed in this case.

A share may be subdivided on partition, and the costs thereof will be charged on that share. *Coles v. Coles*, 367

PARTNERSHIP.

1. When a partnership is dissolved by mutual consent, or determined by the will of either party, a Court of Chancery will not as of course assume the control of the business, and place it in the hands of a receiver. This course will be taken only where it appears necessary to protect the interest of the parties. *Cox v. Peters and Johnson*, 39

2. Partnership property must first be applied to the payment of the partnership debts. The individual creditors are entitled only to share the net residue after the debts of the partnership are satisfied.
- Real estate, although the title stands in the names of the individuals composing the firm, if purchased with the money and for the uses of the firm, belongs to the partnership, and is liable in the first place to the partnership debts.
- One partner cannot convey to a creditor of his own, so as to give him a preference over the creditors of the firm, his undivided interest in the real estate belonging to the firm, although the title to such property stands in the individual names of the partners—such grantee having notice of the equitable rights of the firm in the premises. *Mattlack v. James*, 126
3. Refusing to account, excluding a copartner from an examination of the partnership books, and from a participation in the profits of the business although breaches of duty, do not, standing alone, call for the interposition of the court by injunction before answer, or an opportunity of hearing. *Petit v. Chevelier*, 181
4. A nice or doubtful question of law will not be decided on a motion to dissolve an injunction, but will be reserved for the final hearing.
- An injunction restraining interference with the complainant in the exercise of his rights as a partner of the defendants will be dissolved on the clear averment in the answer, that the partnership was dissolved by mutual consent.
- Can a corporation enter into a copartnership? *Query. Van Kuren v. Trenton Lo. Co.*, 302
- for the purpose of appealing from decree.
- The mere fact that three years have elapsed since the signing of decree cannot be set up on demurrer to the bill of revivor.
- The objection arising from lapse of time is a mere matter of limitation, which must be pleaded, even though the objection appear upon the record. *Peer v. Cookerow*, 136
2. Matters which are known to complainant before the decree in the original suit will not support a supplemental bill: nor will matters which have arisen since, if they are merely cumulative evidence of the charges in the original bill.
- That a supplemental bill is filed without authority of the court is not matter of demurrer, though it may on that ground, in the discretion of the court, be dismissed.
- The supplemental bill in this case held to be multifarious. *Barricklo v. The Trenton Mutual Insurance Company*, 154
3. If a bill unite a demand of several matters of distinct natures against different defendants it is demurrable for multifariousness.
- So if a joint claim against two defendants is joined in the same bill with a separate claim against one of them only, either or both of the defendants may demur for multifariousness. *Emans v. Wortman*, 205
4. A bill of interpleader will not be sustained unless there is a well founded apprehension of danger from conflicting claims to the fund in dispute.
- Under the circumstances of this case the bill was retained, but no costs allowed out of the fund. *Blair v. Porter*, 267
5. On bills of interpleader the court disposes of the questions arising in various modes, according to the nature of the question and the manner in which it is brought before the court.
- If at the hearing the question between the defendants is ripe for decision the court will decide it and pronounce a final decree. *Executors of Condict v. King*, 375
6. A bill setting up an equitable

PLEADING.

1. After decree, if the defendant or his representative have an interest in the further prosecution of the suit, the suit may be revived at his instance.
- A defendant having a beneficial interest may exhibit a bill of revivor

- claim to the land in the widow, and praying that if that claim shall fail that dower may be assigned, is not multifarious. *Rockwell v. Morgan*, 384
7. Where husband and wife are made defendants, the complainant is entitled to their joint answer. *Collard v. Smith*, 43
8. Evidence relative to matters not stated in the pleading is impertinent. *Vansciver v. Bryan*, 434

PRACTICE.

1. Bill amended after final hearing. *Davison v. Davison*, 246
2. A decree will not be opened on the unsupported affidavit of a defendant that the complainant verbally agreed not to prosecute the action. *Marsh v. Lasher*, 253
3. Where a defendant is asking, as a matter of favor, to be permitted to defend, neither a court of law or of equity will grant the request if the defence rests on the ground of usury. *Marsh v. Lasher*, 253
4. On a bill filed for an account and to execute the trust created by a deed absolute on its face, but which in point of fact was executed upon certain trusts, viz. to satisfy the debts of the grantor, and then for the use and benefit of his family, the widow and heirs of the grantor are not only proper but necessary parties.
- All persons whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties. *Pence v. Pence*, 257
5. In a foreclosure suit, when an answer has been filed by a junior encumbrancer, which neither denies the amount claimed nor the order of priority, an order of reference cannot be made, unless by consent, without setting the cause down for hearing. *Wright v. McKean*, 259
6. Alimony.
- Application to increase or diminish the allowance may be made by petition. *Snover v. Snover*, 261
7. When a cause in a divorce suit is referred to a master, it is irregular to examine a witness before another master.
- A divorce will not be decreed upon proof that the husband went away and lived apart from his wife. A mere separation cannot be considered a desertion within the meaning of the statute. *Cook v. Cook*, 263
8. A bill of interpleader will not be sustained unless there is a well founded apprehension of danger from conflicting claims to the fund in dispute.
- Under the circumstances of this case the bill was retained, but no costs allowed out of the fund. *Blair v. Porter*, 267
9. A formal traverse of material matters contained in the bill is not sufficient to dissolve an injunction. The answer must be full and satisfactory.
- A creditor, having exhausted his remedy by execution at law, has a right to come into a court of equity to set aside a conveyance alleged to have been fraudulently made by his debtor. *Brown v. Fuller*, 271
10. In a foreclosure suit the subpoena was returned with the usual affidavit of the nonresidence of the defendant. It appeared that the defendant had separated from his wife, who had gone with her children to her father, the complainant. The defendant, after boarding in the county of Hunterdon for a short time, left the state, and was confined for crime in the penitentiary of Pennsylvania.
- Held, that the actual domicile of the wife was not the legal domicile of the husband; nor could it be regarded, contrary to the fact, as his actual residence within the meaning of the statute regulating the service of process. *McPherson v. Housel*, 35
11. The court will not extend the time for answering in order to admit the defence of usury.
- Where the time has been extended by order of the court without notice to complainant the court will modify the order, so as to exclude the defence of usury.
- When after the time for answering has expired, the complainant grants

- an extension, the defence of usury will not be permitted to be set up. *Contra* where such consent is given before the defendant is in *laches*.
- Where husband and wife are made defendants to a bill in equity, the husband must appear for both, and the complainant is entitled to a joint answer.
- If the husband is unable to put in a joint answer, or if the wife desire to answer separately, or the husband is not in a situation to answer for her, an order for a separate answer must be obtained.
- If either husband or wife answer separately, without an order authorizing it, such answer will be suppressed as irregular.
- The answer must not only be joint, but must be sworn to by the wife, or it will be irregular; but the irregularity will be waived by the complainant filing a replication. *Collard v. Smith*, 43
12. A decree *pro confesso*, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree.
- And when the order for time is made without notice, though it be made to appear affirmatively that the order was signed and filed prior to the signing of the decree, the complainant will be entitled to the costs of proceeding until he is served with a copy or with notice of the order.
- A defendant coming in, without unnecessary delay, by motion or petition, after a decree *pro confesso* regularly taken, will, upon any reasonable ground of indulgence, be permitted to answer upon payment of costs.
- But if it appear, upon an examination of the answer, that it contains no valid ground of defence the decree will not be opened. *Emery v. Downing*, 50
13. Where a party comes into a court of equity seeking relief against a usurious contract, he must offer to pay the sum actually due. *Ware v. Tomkins' Administrators*, 66
14. An order for maintenance *pendente lite* will not be made in behalf of a widow on her bill for dower.
- Upon general principles alimony or maintenance is not allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband. *Rockwell v. Morgan*, 119
15. After a decree *pro confesso*, order of reference, and report of master, the decree will be opened, and the defendant let in to answer, if the equity of the case requires such relaxation of the rules of the court. *Williamson v. Sykes*, 182
16. Where it appears that by the judgment of a court in another state between the same parties, all the material matters of equity relied upon by the complainant in his suit in this court are adjudicated and settled, the bill of complaint will be dismissed.
- A court of equity will not permit a party who has had his rights fully investigated and decided in a court of equity in another state to avoid a final decision in that tribunal, and to raise for reinvestigation the same questions on the same facts. *Brown v. Lexington and Danville Railroad Co.*, 191
17. In practice, commissioners appointed to appraise damages and value lands taken by incorporated companies by force of their charters have frequently, if not uniformly, united the value of the land and the damages in the same sum without discrimination.
- The better practice would be to distinguish the value of the land from the damages.
- It is well settled that the appraisal includes prospective damages resulting naturally and directly from the works of the company for all time to come. *Trenton Water Power Co. v. Chambers*, 199
18. A corporate aggregate must answer under the seal of the corporation.
- They may adopt and use any seal *pro hac vice*.
- If the seal is dispensed with it should be by leave of the court previously obtained and for good cause shown. *Ransom v. Stonington Savings Bank*, 212
19. On bills to restrain the execution of process or the performance of

- official acts the sheriff is made a party, as the design of the injunction is to restrain him from acting; but where no relief is prayed, and no decree asked against the officer, it is not necessary, nor usually expedient, for the sheriff to answer. *Brooks v. Lewis*, 214
20. After the testimony has been closed, and the cause regularly set down for final hearing, the court will not permit a supplementary answer to be put in, unless the delay is satisfactorily accounted for. It should appear that the matter of the supplementary answer is new, or a sufficient reason given for not having it in the original answer.
- The mortgage sought to be foreclosed was given to secure part of the consideration on the purchase of the mortgaged premises. The title to a part of the premises failed. The complainants were not the vendors of the premises nor the original mortgagees. They held the mortgage by assignment, executed prior to the sale of the premises by the original mortgagor to the defendant. Under these circumstances, the fact that the title made by the mortgagor to the defendant, the present owner, was defective, can in no wise affect the rights of a *bona fide* mortgagee under a mortgage executed prior to the conveyance. *Smallwood v. Lewin*, 123
21. If no replication has been filed the facts stated in the answer must be taken as true on the hearing.
- A decree rendered against the complainant was opened, upon it appearing that the cause had been submitted to the court by the counsel of the complainant under the misapprehension that an answer to the replication had been filed.
- Had the counsel upon both sides acted under the same misapprehension, and the evidence in the cause been taken, the filing of the replication would have been regarded as a mere form, and would have been permitted at the hearing as a matter of course. *Gaskill v. Sine*, 130
22. After decree, if the defendant or his representative have an interest in the further prosecution of the suit, the suit may be revived at his instance.
- A defendant having a beneficial interest may exhibit a bill of revivor for the purpose of appealing from decree.
- The mere fact that three years have elapsed since the signing of decree, cannot be set up on demurrer to the bill of revivor.
- The objection arising from lapse of time is a mere matter of limitation, which must be pleaded, even though the objection appear upon the record. *Peer v. Cookerow*, 136
23. After a sale on foreclosure the court will compel the mortgagor, or any person who has come in possession under him pending the suit, or whose title is not superior to his, to deliver up the possession of the premises, and will not drive the purchaser to an action of ejectment.
- And this assistance will be extended to a stranger to the record purchasing at such sale as well as to the mortgagee.
- The mode of proceeding has been as follows, viz. 1, a demand of possession by the purchaser of the tenant in possession accompanied by an exhibit of the deed from the sheriff or master; 2, order to deliver possession; 3, injunction; and 4, writ of assistance.
- The exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. *Schenck v. Conover*, 220
24. Where a bill has been dismissed or demurrer allowed, and another bill is filed for the same matter, this court will stay proceedings in the second suit till the costs of the former are paid. *Udike v. Bartles*, 231
25. In case a bill for a specific performance of an agreement for the sale of land containing averments of a parol enlargement of the time of payment, possession, and the erection of permanent improvements, the injunction will be dissolved upon the filing of an answer denying those averments.

- It is not necessary that affidavits annexed to answers should be taken upon notice, or that copies should be served on the adverse party.
- Where a motion is made to dissolve an injunction upon the answer, affidavits annexed to the answer can only be read in reply to affidavits annexed to the bill. *Gariss v. Gariss*, 320
26. The terms of a contract must be clearly proved before a party is entitled to a decree for specific performance. *Lokerson v. Stillwell*, 357
27. When the ends of justice require it, the injunction will be continued to the hearing.
- If the defendant is absent from the country, his oath to the answer must be taken under a commission.
- Affidavits annexed to an answer need not be taken on notice, nor is it necessary to serve copies, unless in special cases, under the rules of the court. *Stotesbury v. Vail*, 390
28. An order to deliver possession to the purchaser of mortgaged premises sold under a decree of foreclosure will be made only upon notice of the application and proof that the deed was shown to the tenant, that a demand of possession was made, and that the tenant refused to comply.
- The injunction, as well as the attachment to enforce obedience to the order, is disused.
- Under the present practice, the writ of assistance does not issue of course, but upon notice of the application and proof of the services of the order to deliver possession and refusal to obey. *Fackler v. Worth*, 395
29. To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him.
- Personal service will be dispensed with where the party is out of the state or cannot be found.
- The modern practice is for the court, by special order, to dispense with personal service where the defendant avoids the service of the writ, or other circumstances render such order necessary or proper.
- The court will punish the violation of its order for the injunction though the writ be not served, if it appear that the defendant knew of its existence.
- Where the defendant and his wife were nonresidents, and the injunction was served out of the state on the husband, and proof was made that the wife could not be found, an order was made that such service should be deemed valid, and directing a copy of such order to be served at the dwelling house of the defendants. *Haring v. Kauffman*, 397
30. Where the complainant, being a corporation, sues by a wrong name, the bill may be amended in this respect at the hearing. *Hoboken Building Association v. Martin*, 427
31. The object of an issue out of chancery to be tried by a jury is to inform the conscience of the Chancellor, and it is his province to determine what evidence shall be read before the jury. *Black v. Shreve*, 456
32. The action of the Chancellor on the verdict is a matter resting in his discretion, and is not subject to review in the appellate court. *ib.*
33. Where a sole defendant lives out of the state, and no foreign publication is ordered or notice given to the defendant, costs on opening the decree ordered to abide the event of the court. *Oram v. Dennison*, 438

PURCHASER.

See VENDOR AND PURCHASER.

RECEIVER.

When a partnership is dissolved by mutual consent, or determined by the will of either party, a Court of Chancery will not *as of course* assume the control of the business, and place it in the hands of a receiver. This course will be taken

only where it appears necessary to protect the interest of the parties. *Cox v. Peters and Johnson*, 39
In matters of receivers' accounts. *Holcombe v. Ex'rs of Holcombe*, 417

REMAINDER.

When held to be vested. *Price v. Sisson*, 168

SALE.

The rule is inflexible, that a sale made by an administrator, or any other acting in a fiduciary capacity, to himself or for his benefit, will be held void at the instance of the party prejudiced.
The remedy in equity is to set aside the sale on equitable terms, and to treat the administrator as a trustee for the parties in interest. *Houston v. Cassidy*, 228

SPECIFIC PERFORMANCE.

The terms of a contract must be clearly proved before a party is entitled to a decree for specific performance. *Lokerson v. Stillwell*, 357
Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.
A father, having conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suitable to their condition, wherever they or either of them might choose to reside, a specific performance of the contract was decreed in his favor. *Chubb v. Peckham*, 207
See *Garriss v. Garriss*, 320

STATUTES.

1. A mortgagee is a purchaser within the statute of frauds. *Laralette v. Thompson*, 274

2. Every statute is by implication a repeal of all prior statutes, so far as it is repugnant thereto.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet if it was clearly intended to prescribe the only rule that should govern in the case provided for it repeals the original act.

But unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force.

There is nothing in the act to establish the city of Elizabeth which expressly or by necessary implication supersedes the trustees of the incorporated school district or abrogates their rights of property. *Industrial School District v. Whitehead*, 290

3. By the New Jersey statute of March 12, 1851, the words "dying without issue" are made to denote a definite failure of issue. *Executors of Condict v. King*, 375

4. A parol surrender of demised premises, although invalid at law by reason of the statute of frauds, will be sustained in equity when consummated by a delivery of the counterpart of the lease, the key of the dwelling, and the possession of the premises to the landlord. *Stotesbury v. Vail*, 390

5. Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable.

The act of 1857, which provides that a *feme covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real estate, or to make contracts in regard to it.

A contract entered into by a married woman for the sale of her estate cannot be enforced.

But equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate. *Pentz v. Simonson*, 272

6. The act of 20th March, 1860, giving the custody of children under seven years of age to the mother, is not unconstitutional. *Bennett v. Bennett*, 114
7. Mechanics' lien under the statute takes priority upon the building over a prior mortgage upon the land. *Newark Lime and Cement Co. v. Morrison*, 133
8. By force of the statute, a decree directing a conveyance to be made vests the estate. *Price v. Sisson*, 168
9. A loan made on the 8th of May, 1856, the lender living in Essex and the borrower in Middlesex, the land lying in the latter county—held not to be usurious as the law then stood. *Marsh v. Lasher*, 254
10. See *Usury*, 4

STOCK.

Shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the said corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the bailor who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with a blank irrevocable power of attorney for the transfer thereof from the bailor to the bailee.

M. delivered to the complainants the certificates of certain stock of a corporation, accompanied by a power of attorney irrevocable for the transfer thereof, as collateral security for certain of his notes, and the renewals thereof. The charter of said corporation provided that its capital stock should be deemed personal estate, and "be transferable upon the books of said corporation:" and further, "that books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of said corporation." A creditor of M. then levied an at-

tachment upon this stock. *Held*, that the transfer to the complainants was effectual as against such attaching creditor. *The Broadway Bank v. McElrath*, 24

STREET.

See INJUNCTION.
NUISANCE.

SUBROGATION.

To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment. *Wilson v. Brown*, 277

SURRENDER.

A parol surrender of demised premises, although invalid at law by reason of the statute of frauds, will be sustained in equity when consummated by a delivery of the counterpart of the lease, the key of the dwelling, and the possession of the premises to the landlord.

In such case the court will enjoin the collection of the after accruing rent. *Stotesbury v. Vail*, 390

TENDER.

Must be unconditional. *Moore v. Vail*, 299

TRUSTEES AND TRUSTS.

1. The law is well settled in this state, that when executors jointly settle their final account they are jointly liable for the balance so ascertained.

In such case the parties interested may rely on the settlement, and are not driven to a discovery in whose hands the funds are or in what proportion the executors are liable.

If a trustee, by his own negligence, suffers his cotrustee to receive and waste the trust fund, when he had the means of preventing such receipt and waste by the exercise of reasonable care and diligence, he will in such case be held personally responsible for the loss. *Laroe v. Douglass*, 308

2. Amount of commission to be allowed guardian and receivers.

A trustee has no right to subject the trust fund unnecessarily to charges for counsel fees. *Holcombe v. Holcombe*, 415

3. A conveyance to the grantees and their heirs, for the use of the grantees and their heirs in trust for the persons beneficially interested, does not vest the legal estate in the latter by virtue of the statute for transferring uses into possession. *Price v. Sisson*, 168

4. When the deed is thus technically drawn the trustees take the legal estate by virtue of the limitation without the aid of any reasoning derived from the nature of the estate. *ib.*

5. In construing limitations of trusts courts of equity adopt the rule of law applicable to legal estates. *ib.*

USURY.

1. The court will not extend the time for answering in order to admit the defence of usury.

Where the time has been extended by order of the court without notice to complainant the court will modify the order, so as to exclude the defence of usury.

When after the time for answering has expired, the complainant grants an extension, the defence of usury will not be permitted to be set up. *Contra* where such consent is given before the defendant is in *laches*.

Where husband and wife are made defendants to a bill in equity, the husband must appear for both, and the complainant is entitled to a joint answer.

If the husband is unable to put in a joint answer, or if the wife desire to answer separately, or the hus-

band is not in a situation to answer for her, an order for a separate answer must be obtained.

If either husband or wife answer separately, without an order authorizing it, such answer will be suppressed as irregular.

The answer must not only be joint, but must be sworn to by the wife, or it will be irregular; but the irregularity will be waived by the complainant filing a replication. *Collard v. Smith and Wife*, 43

2. A bond valid in its inception is not rendered invalid by the subsequent receipt of usurious interest.

If after the completion of the contract, a part of the loan is withheld as a premium for the loan, in violation of the agreement, the contract is not thereby rendered usurious.

Where a party comes into a court of equity seeking relief against a usurious contract, he must offer to pay the sum actually due. *Ware v. Thompson's Administrators*, 66

3. Where a defendant is asking, as a matter of favor, to be permitted to defend, neither a court of law or of equity will grant the request if the defence rests on the ground of usury.

Usury is not regarded as an equitable defence.

A loan made at seven per cent. on 8th of May, 1836, the lender living in Essex, and the borrower in Middlesex, the land lying in the latter county, held not to be usurious as the law then stood. *Marsh v. Lasher*, 253

4. To legalize the taking of seven per cent. interest on contracts by virtue of the supplements to the act concerning usury, the contract must be actually made within one of the districts specified in the act. *McMurtry v. Giveans*, 351

VENDOR AND PURCHASER.

1. An innocent purchaser is not liable to a latent equity of which he was ignorant. *Lavalette v. Thompson*, 274

2. A mortgagee is a purchaser within the statute of frauds. *ib.*

3. Where the owner of a spring lot, and of a paper mill on another tract, by an artificial arrangement conveys the water to the mill, and then sells the spring lot, the purchaser takes it subject to the burthen.

The principle is, that where the owner of two tenements sells one of them, the purchaser takes the tenement, or portion sold, with all the benefits and burthens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. *Seymour v. Lewis*, 439

4. Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor to which such land is subject, he thereby becomes a surety in respect to the mortgage debt. *Klapworth v. Dressler*, 62

WIDOW.

In proceedings for partition, where after a sale of the premises the widow, who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statutes of this state, to accept in lieu of her said dower such sum in gross as the Chancellor should deem reasonable, and then having died before distribution, it was *held*, that the right vested in the widow to receive a sum in gross interest could not be divested by her death, but should go to her children. *Held further*, that the value of the widow's interest should be ascertained on the principles of life annuities.

Where the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale. *Mulford and Wife v. Hiers*, 13

WILLS.

1. Where the terms of a bequest of personalty are such as would, in a devise of real estate, create an es-

tate tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void.

Where the gift is to A. and his issue, or to A. and the heirs of his body, and the limitation over is upon an indefinite failure of issue, the estate vests absolutely in the first taker.

But where the limitation over is upon a definite, not an indefinite failure of issue, the first legatee takes an estate for life only, and the limitation over is good. And it is immaterial in such case whether the gift to the first taker be of the subject itself or only of the use.

The law requires wills, both of real and personal estate, to be in writing, and parol evidence is not admissible to add to, contradict, or vary their contents. *Cleveland v. Havens*, 101

2. Words in a will, which if applied to real estate would create an estate tail will, vest personal estate absolutely in the legatee.

Consequently a bequest of personal property to take effect on the death of the first legatee *without issue*, or on the failure of *heirs of his body*, without other restriction, is too remote.

But it is equally well settled that a legacy of a chattel interest generally, or for life, or for any number of lives in being, and limitation over upon the failure of issue confined to twenty-one years after a life in being, is good.

A testator bequeathed the interest of the fund to his wife during her life, and upon her death he gave the fund to his two sisters, Eliza and Susan, in equal shares, "during their lifetime," and upon the death of either of them to the survivor, "for her lifetime;" but if both or either of them should die leaving a child or children, the share of each, "so bequeathed for her lifetime only," to go to her child or children. If one should die leaving a child or children, and the other should die leaving no child, the shares of both to go to such child or children. If both should die "leaving no heir or heirs, the shares of both to go to

the children of testator's sister Augusta; but should she have no children living at the time the above bequeathed property should have lawfully gone from the possession of the testator's wife, and also from the possession of either or both of her sisters, Eliza and Susan, then the property bequeathed to become the property of all the other legal representatives of the testator.

Held, that the bequest over upon the death of the testator's sisters was not upon their *death without issue* or upon the *failure of issue*, but upon their dying "leaving no children," and that those terms import leaving no children at the death of the legatee.

Also, the bequest being upon the death of either of the sisters without issue "*to the survivors*," it imports that the testator intended the bequest to take effect upon a definite failure of issue, and consequently the sisters take only the use of the fund for life. *Fairchild v. Crane*, 105

3. Testatrix was possessed of personal and real estate, and by her will directed the latter should be sold by her executors, and after giving numerous pecuniary legacies, principally among her relatives and the relatives of her deceased husband, she added, "and if there is anything over and above left, let it be equally divided among all the heirs."

Held, that the word heirs, in the above connection, means "next of kin."

Where money or personal property is bequeathed to the heirs of A. or to the heirs of the testator, if there be nothing in the will showing that the testator used the word in a different sense, the next of kin are entitled to claim under the description as the persons appointed by law to succeed to personal property.

It is also a well settled rule in equity that where lands are directed to be converted into money, and the proceeds given as a legacy, it will be treated as a legacy of personal estate.

Where the property under a bequest

passes to the persons entitled under the statute of distributions to receive it, in the absence of any express directions in the will it will go in the proportions prescribed by the statute. In such case, where they are not all in equal degree the children of a deceased parent will take by right of representation *per stirpes*, and not *per capita*.

But in this case the direction being that the fund shall be divided equally among all the heirs, the direction must prevail, and the legatees take *per capita*. *Scudder v. Vanarsdale*, 109

4. When the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him without any limitation as to continuance, the principal will be regarded as bequeathed also. *Craft and others v. The Executors of Snook*, 121

5. When legacies are directed to be paid out of the estate of the testator, the real estate is charged with the legacies.

So when the lands are devised to the executors, who are directed to pay the legacies.

The general rule, that a legacy bears interest from the time it is payable, admits of an exception where a legacy given by a parent to a minor child is made payable at a future day, and no provision is made for the support of the legatee in the meantime.

Interest not allowed under the language of the will in question and the circumstances of the case. *Or et ux. v. Corkendall*, 138

6. The testator directed his real and personal estate to be divided into fourteen equal parts, and devised and bequeathed one fourteenth part to his son James, disposing of the residue among his other children. By a subsequent clause in his will, the testator ordered that from the value of the estate devised and bequeathed to his children, his executors should deduct, respectively, the amount of "money heretofore paid and advanced to or for either of my said children, or to either of the husbands of my said daughters, and all other moneys and accounts in which they

- may be severally indebted to me at the time of my decease."
- At the time of testator's death James was indebted to him.
- James' share in the land devised under the will was claimed by virtue of an assignment which he had made, and also by force of a sheriff's sale under a judgment.
- Held*, that the claim of the executors to deduct the debts due the estate from James' share of the proceeds of lands sold under proceedings in partition was paramount to the rights acquired by the assignment or the sheriff's sale. *Smith v. Smith*, 164
7. A testator devised as follows, viz. "Item. I give and bequeath to my beloved wife the use and benefit of my home farm on which I now live as long as she remains my widow. At her marriage or decease, I will that the aforesaid farm be sold at one or two years' credit. Item. I give and bequeath also to my beloved wife Mary five hundred dollars of the money arising out of the sale of said farm." By a subsequent clause, the testator gave as follows: "Item. I give and bequeath to my beloved wife Mary one hundred dollars out of the personal estate."
- Held*, that the bequest of five hundred dollars to the wife was vested at death of testator, and at her death passed to her personal representatives. *Owen v. Owen*, 188
8. Where lands are devised to a woman and her children, she having children living at the time of the devise, the word "children" must be taken as a word of purchase, and the children take a joint estate with the mother. A provision that the devisee shall pay an annuity for the life of another is sufficient at the common law to enlarge a life estate to a fee simple.
- A testator bequeathed the rest, residue, and remainder of his real and personal estate to his grand daughter and her children, provided she should pay to S. the sum of \$40 during her natural life, and should paint and keep in good repair the fence around his burial lot. At date of will and at the death of the testator the grand daughter had two children living, a son and a daughter. In a previous part of the will provision was made for the son of the grand daughter, the fund being withheld from him until he attained twenty-one.
- Held*, that the property included in the residuary clause went exclusively to the grand daughter.
- Held further*, that her estate in the lands was a fee simple, and not a fee tail.
- There was a codicil to the above will, as follows: "I, D. J., make this codicil to my last will and testament, that is, I sell unto C. S. my tavern house and lot, with one-third of the lot behind the barn, for the sum of \$6950, provided he, the said C. S., satisfies my executors as to the payment of the same." *Held*, that the design of the codicil was to empower the executors to convey the land which the testator had agreed to sell upon the payment by the vendee of the purchase money.
- It is not competent for the purchaser to show by parol evidence that the scrivener who drew the codicil made a mistake, and that he was to have two-thirds of the lot behind barn. *Jones' Executors v. Jones*, 236
9. When an annuity is charged on real estate the rule is, that it does not commence until the devisee of such estate is entitled to the possession thereof.
- This principle is applicable where a sum of money is charged on land in which the testator had only a reversion.
- The lapse of twenty years without payment or allowance of principal or interest of a legacy will raise a presumption of payment, but such presumption may be overcome by evidence.
- The wife's right of dower will be protected as against post nuptial mortgages not executed by her. *Hayes and Wife v. Whitall*, 241
10. The personal estate alone is liable for the payment of legacies, unless the land is by the will made chargeable either expressly or by clear implication.
- Parol evidence of the declarations of the testator is not admissible to

show an intention to charge legacies upon the land.

That the personal estate is not sufficient to pay the legacies will not of itself make the land chargeable.

Massaker v. Massaker, 264

11. The expression in a will "dying without lawful issue," under a well settled rule of law, imported an indefinite failure of issue.

Personal property could not be limited over on so remote a contingency, and consequently under such a gift of a personal chattel the legatee took the absolute property.

But by the New Jersey statute of

March 12th, 1851, the words "dying without issue" and similar expressions are made to denote a definite failure of issue, so that the will of a person dying since that act went into effect, thus limiting personal property, will pass to the legatee only a defeasible interest, which will cease upon his dying without leaving issue at his death.

Where one legacy is given as a mere substitute for another the substituted gift is subject to the incidents of the original gift, although not so expressed in the testamentary instrument. *Executors of Condict v. King*, 375







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